DOCKET

SUPREME COURT
OF THE UNITED STATES

No.	10-91
Title:	Bill K. Wilson, Superintendent, Indiana State Prison, Petitioner v. Joseph E. Corcoran
Docketed:	July 15, 2010
Lower Ct:	United States Court of Appeals for the Seventh Circuit
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Decision Date:	January 27, 2010
Rehearing Denied:	April 14, 2010

---Date---	--------Proceedings and Orders----------
Jul 13 2010	Petition for a writ of certiorari filed. (Response due August 16, 2010)
Aug 6 2010	Brief of respondent Joseph E. Corcoran in opposition filed.
Aug 6 2010	Motion for leave to proceed in forma pauperis filed by respondent.
Aug 18 2010	DISTRIBUTED for Conference of September 27, 2010.
Sep 15 2010	Reply of petitioner Bill K. Wilson, Superintendent, Indiana State Prison filed. (Distributed)
Oct 1 2010	Record Requested.
Oct 1 2010	Record received from US Court of Appeals for the Seventh Circuit. (Electronically - six files)
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Nov 1 2010	DISTRIBUTED for Conference of November 5, 2010.
Nov 8 2010	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Nov 8 2010	Petition GRANTED. Judgment VACATED and case REMANDED. Opinion per curiam. (Detached Opinion)
Dec 10 2010	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

10-91 JUL 13 2010

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

WILLIAM WILSON,
Superintendent, Indiana State Prison,
Petitioner,

v.

JOSEPH EDWARD CORCORAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Indiana law prohibits the use of non-statutory aggravating circumstances to sentence a person in a capital case. The trial court sentenced Corcoran to death for quadruple murder. In its order, the trial court discussed the nature of Corcoran's crimes and Corcoran's character—which are not statutorily authorized aggravators—yet also expressly stated that it had not considered those particulars as aggravating circumstances. On appeal, the Indiana Supreme Court accepted the trial court's explanation as comporting with state law and independently reviewed—and affirmed—Corcoran's sentence.

On collateral review, the Seventh Circuit granted habeas corpus relief and rejected the Indiana Supreme Court's ruling that the trial court did not violate state law.

1. Does a state capital defendant have a constitutional right to a sentencing decision informed in no way by facts that are neither elements of a crime of which he stands convicted or aggravating circumstances authorized by statute?

2. If so, may a federal court grant habeas relief based on its own finding that a state trial court improperly considered non-statutory aggravators when imposing a sentence of death, contrary to the determination of the state supreme court on that issue?

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PETITION FOR WRIT OF CERTIORARI

The State of Indiana, through William Wilson, Superintendent of the Indiana State Prison, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit that granted Joseph Corcoran a writ of habeas corpus from his sentence of death.

OPINIONS BELOW

The most recent opinion of the Court of Appeals granting habeas corpus relief (App. 1a) is reported at *Corcoran v. Levenhagen*, 593 F.3d 547 (CA7 2010), *as amended by denial of reh'g and reh'g en banc*. The opinion of this Court remanding the case for further consideration (App. 16a) is reported at *Corcoran v. Levenhagen*, 558 U.S. __ (2009). The first opinion of the Court of Appeals reversing the grant of habeas corpus relief (App. 18a) is reported as *Corcoran v. Buss*, 551 F.3d 703 (2008), *reh'g and reh'g en banc denied*. The order of the district court granting a writ of habeas corpus (App. 53a) is reported at *Corcoran v. Buss*, 483 F.Supp.2d 709 (N.D.Ind. 2007). The decisions of the Indiana Supreme Court regarding Corcoran's alternate attempts to waive and seek state post-conviction review are reported at *Corcoran v. State*, 820 N.E.2d 655, *aff'd on reh'g*, 827 N.E.2d 542 (Ind. 2005), and *Corcoran v. State*, 845 N.E.2d 1019 (Ind. 2006). The decision of the Indiana Supreme Court on direct appeal from resentencing (App. 107a) is reported at *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002). The opinion of the Indiana Supreme Court on direct appeal affirming Corcoran's

conviction and reversing his sentence is reported at *Corcoran v. State*, 739 N.E.2d 649 (Ind. 2000).

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 2010. App. 147a. A petition for rehearing was denied on April 14, 2010. App 143a-144a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. AMEND XVI, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(a), (d), (e)(1)

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT

1. Joseph Corcoran is convicted of, and was sentenced to death for, the murders of four men, including his brother and his sister's fiancé. The Indiana Supreme Court summarized the facts underlying the crime as follows:

> The nature of the offense is clear; Corcoran and his defense team do not dispute the events. On July 26, 1997, Corcoran was lying on his bedroom floor and heard men's voices. He became upset because he thought the men were talking about him and took a semi-automatic rifle downstairs to confront them. In the living room were four men, including Corcoran's brother and future brother-in-law, both of whom lived in the house with Corcoran.
>
> Corcoran shot and killed Jim Corcoran, Scott Turner and Timothy Bricker at close range. The final victim, Doug Stillwell, tried to escape, but Corcoran chased him into the kitchen and shot him in the head.

App. 117a.

2. The State of Indiana charged Corcoran with four counts of murder. At trial, the jury found Corcoran guilty on all counts, found the aggravating circumstance of multiple murders, and unanimously recommended that the trial court impose the death penalty. App. 109a.

The trial court followed that recommendation and sentenced Corcoran to death. When sentencing Corcoran, the trial court discussed the statutory aggravating circumstance of multiple murders, the several mitigating circumstances offered by Corcoran, and offered its observations about the nature of the offenses and Corcoran's character. *Corcoran v. State*, 739 N.E.2d 649, 651 (Ind. 2000) (*Corcoran I*). Specifically as to the latter point, the trial court remarked in its oral sentencing statement,

> Pursuant to the law, Indiana Code 35-50-2-9(k), I'm required to balance aggravating circumstances proved by the State of Indiana against mitigating circumstances proved by the Defense. That has been a very difficult process, and not a process that I have ever taken lightly, and certainly would never take lightly, Mr. Corcoran. Your emotional and mental disturbance is of concern to this Court. Also of concern to this Court is that none of the experts can seem to give me a straight answer, Mr. Corcoran, of what is really going on inside your head. And maybe it is as [the prosecutor] argued in his closing, that society just cannot begin to comprehend why you would do what you did, so we've got to say, there's got to be something wrong with this guy to have done what he did. I'm not going to say that, Mr. Corcoran, because I don't know. *I do know, however, that the knowing and intentional murders of four innocent people is an extremely heinous and aggravated crime. That makes you, Mr. Corcoran, a mass murderer. [The prosecutor] is right. I don't think in the history of*

> *this county we've had a mass murderer such as yourself. It makes you, Mr. Corcoran, a very dangerous, evil mass murderer. And I am convinced in my heart of hearts, Mr. Corcoran, if given the opportunity, you will murder again.*

Corcoran I, 739 N.E.2d at 656-57 (emphasis added); Trial R. 2915-16.

On direct appeal, Corcoran appealed only his sentence. The Indiana Supreme Court upheld the constitutionality of Indiana's death penalty as it applied in Corcoran's case and specifically rejected Corcoran's argument that the State violated his Sixth Amendment right to a jury trial when the State offered to refrain from seeking the death penalty if Corcoran would waive a jury trial. *Corcoran I*, 739 N.E.2d at 654. However, the state supreme court vacated the death sentence and remanded the case for resentencing due to the possibility that the trial court impermissibly relied upon non-statutory aggravating circumstances, specifically the heinousness of the crimes, the innocence of the victims, and the trial court's belief that Corcoran will murder again if given the opportunity. *Id.* at 657. Chief Justice Shepard separately concurred, expressing his view that the trial court's statements were made to explain why the multiple murder aggravating circumstance received such great weight, but he agreed that remand was appropriate to clarify the matter. *Id.* at 658 (Shepard, C.J., concurring).

On remand, the trial court reimposed a death sentence. App. 124a. In its revised sentencing order, the trial court stated,

> Pursuant to I.C. 35-50-2-9(k), and the December 6, 2000 Order from the Supreme Court, the trial Court . has balanced the aggravating circumstances proved by the State against the mitigating circumstances proved by the Defendant. The trial Court, in balancing the proved aggravators and mitigators, emphasized to the Supreme Court that it only relied upon those proven statutory aggravators. The trial Court's remarks at the sentencing hearing, and the language in the original sentencing order explain why such high weight was given to the statutory aggravator of multiple murder, and further support the trial Court's personal conclusion that the sentence is appropriate punishment for this offender and these crimes.

App. 131a.

On appeal, the Indiana Supreme Court affirmed. App. 107a. With regard to Corcoran's allegation that the trial court considered non-statutory aggravating circumstances, the state supreme court concluded,

> We are now satisfied that the trial court has relied on only aggravators listed in Indiana Code § 35-50-2-9(b). In response to our remand, the trial court stated, "[I]n balancing the proved aggravators and mitigators, [the trial court] emphasizes to the Supreme Court that it only relied upon those proven statutory aggravators."

> There is no lack of clarity in this statement and no plausible reason to believe it untrue.

App. 112a-113a (citation omitted). Additionally, the state supreme court independently reconsidered Corcoran's death sentence and found that the single aggravating circumstance of multiple murders was weightier than the proffered mitigating circumstances, including that Corcoran suffered from a mental illness. App. 116a-120a. In dissent, Justice Rucker expressed his view that Corcoran's mental illness causes his death sentence to violate the Eighth Amendment. App. 121a.

3. Indiana law required Corcoran to file a petition for post-conviction relief in the state trial court by September 9, 2003. *Corcoran v. State*, 820 N.E.2d 655, 657 (*Corcoran III*), *aff'd on reh'g*, 827 N.E.2d 542 (Ind. 2005) (*Corcoran IV*). Corcoran, however, refused to sign the petition his attorneys prepared for him, thereby preventing its filing. *Corcoran III*, 820 N.E.2d at 657.

His counsel moved the post-conviction court for a competency determination, which the court conducted. *Id.* at 657-58. After hearing testimony by experts and Corcoran, the post-conviction court found that although Corcoran suffers from a mental illness, he nonetheless understood the proceedings, the ramifications of his actions, and was able to make rational choices regarding his case; thus it found him competent to make the decision not to pursue state post-conviction review. *Id.* at 661.

The Indiana Supreme Court affirmed the competency determination. *Id.* at 658-62. The court reaffirmed its decision on rehearing. *Corcoran IV*, 827 N.E.2d at 543.

While that appeal was pending, Corcoran changed his mind, signed, and attempted to file the post-conviction relief petition that his attorneys had prepared for him. *Corcoran v. State*, 845 N.E.2d 1019, 1020 (Ind. 2006) (*Corcoran V*). The post-conviction court dismissed the petition as untimely, a judgment that the Indiana Supreme Court affirmed. *Id.*

4. Corcoran next filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana. Corcoran made several claims, including that (1) prosecutors violated his Sixth Amendment right to a trial by jury by offering to forego seeking the death penalty if Corcoran agreed to waive a jury trial; (2) he was incompetent to decide whether to waive state post-conviction review, and (3) the trial court improperly considered non-statutory aggravating circumstances while refusing to consider all of his proffered mitigating circumstances when sentencing him to death.

The district court held that the prosecution's offer served to coerce Corcoran into waiving his constitutional right to a jury trial or else be executed. App. 72a-87a. The district court also found, however, that the state courts' determinations that Corcoran was competent to forego state post-conviction review was reasonable and denied relief

on that basis. App. 94a-105a. The district court granted a writ of habeas corpus contingent upon the State's failing to impose a sentence other than death on Corcoran. App. 105a-106a. Because it granted habeas relief on other grounds, it found Corcoran's other claims, including those regarding aggravating and mitigating circumstances, to be moot. App. 87a-88a.

The State appealed the judgment and Corcoran cross-appealed, challenging the competency determination. The Seventh Circuit reversed the grant of a writ of habeas corpus. The panel unanimously held that the Indiana Supreme Court reasonably applied *United States v. Jackson*, 390 U.S. 570 (1968), and other precedents of this Court in determining that Corcoran's jury trial rights were not infringed upon by the prosecutor's offer. App. 30a-39a, 44a. Additionally, a panel majority held that the Indiana courts reasonably found Corcoran to be competent to forego state post-conviction review. App. 39a-43a. Judge Williams dissented from the latter finding and wrote separately to express her view that the state courts unreasonably determined that Corcoran was competent to waive state post-conviction review. App. 44a-52a.

Corcoran petitioned for rehearing and argued in part for the first time that instead of denying him habeas relief, the court of appeals should have remanded the case to the district court to adjudicate other claims raised in Corcoran's habeas petition that the district court had found to be moot in light of its grant of habeas relief. The panel denied

rehearing and no judge called for a vote on the suggestions for rehearing en banc.

This Court granted Corcoran's petition for a writ of certiorari, vacated the judgment, and remanded the case to the Seventh Circuit for consideration of Corcoran's remaining claims that the district court had found to be moot. App. 16a-17a.

On remand, the Seventh Circuit addressed Corcoran's remaining claims without briefing. It found that Corcoran had waived all of those claims because he did not raise them in his cross-appeal. App. 5a. However, the court addressed Corcoran's claims regarding the trial court's consideration of aggravating and mitigating circumstances because they constituted "plain error." App. 5a. Specifically, it found that the state supreme court's findings that the trial court had not considered non-statutory aggravating circumstances was an "unreasonable" determination of the facts because while the trial court disclaimed the use of the additional facts as separate aggravating circumstances, it acknowledged using them to help determine what weight to give the statutory aggravating circumstance. App. 5a-7a. The Seventh Circuit also held that the trial court erred in not considering Corcoran's age when evaluating the mitigating circumstances. App. 7a-10a. Finally, it rejected on the merits Corcoran's remaining claims, except for his competency to be executed claim, which is unexhausted. App. 10a-15a.

The State petitioned for rehearing and rehearing *en banc*, arguing that (1) this Court's opinion in

Wainwright v. Goode, 464 U.S. 78 (1983) (*per curiam*), and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) foreclosed a habeas court from reevaluating for itself a state supreme court's assessment of whether a trial court complied with state law regarding non-statutory aggravating circumstances; and (2) the transcript shows that the trial court did in fact consider Corcoran's age when finding mitigating circumstances. While the court declined to rehear the case, it amended its opinion to add the following language to the portion of its opinion regarding the aggravating circumstances:

> This [remand for resentencing] will cure the state trial court's "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1). (It will also prevent noncompliance with Indiana law. Petitioner contended that, under the circumstances of this case, noncompliance with state law also violates the federal Constitution and thus warrants him relief under 28 U.S.C. § 2254(d)(2). Respondent has not advanced any contrary argument based on *Wainwright v. Goode*, 464 U.S. 78 (1983),. or any similar decision.)

App. 144a-145a. It also retracted its finding that the trial court did not consider Corcoran's age and denied habeas relief on that claim. App. 145a-146a.

REASONS TO GRANT THE PETITION

I. The Seventh Circuit's decision is irreconcilable with this Court's decision in *Wainwright v. Goode*

Wainwright v. Goode, 464 U.S. 78 (1983) (per curiam), controls this case. Arthur Goode kidnapped, sexually assaulted, and strangled to death a 10-year old boy in Florida "for the fun of it" before going to Maryland, where he kidnapped two other boys and murdered one of them in Virginia. *Goode*, 464 U.S. at 79-80. At trial, Goode testified that he was "extremely proud" of having murdered the Florida boy and would do it again if given the chance. *Id.* at 80. The Florida trial court found that Goode was beyond rehabilitation and that execution was the only way to prevent Goode from harming another human being. *Id.* at 80-81. Florida law, however, did not permit future dangerousness to be a permissible factor to consider in capital sentencing. *Id.* at 82 n.3.

The Florida Supreme Court affirmed Goode's death sentence because its review of the record revealed that the trial court had not considered Goode's future dangerousness as an aggravating circumstance, but rather the trial court discussed it as a reply to defense counsel's argument and to explain "why the result of [its] weighing process was correct." *Id.* at 82. The Eleventh Circuit found that the Florida Supreme Court's factual finding was "not fairly supported by the record as a whole," and reasoned that it violated the Eighth Amendment to sentence Goode to death based at least in part of his

future dangerousness when other Florida defendants could not be so sentenced. *Id.* at 83.

This Court reversed on three alternative bases. First, it held that the Eleventh Circuit erred in not accepting the Florida Supreme Court's conclusion that the trial court did not violate state law. *Id.* at 83-84. Second, the Court held, under former habeas standards, that a state court's factual determination about what one of its courts actually did—even when the record is ambiguous—must be respected so long as it is "fairly supported" by the record. *Id.* at 84-85. Third, the Court held that even if a state court considers non-statutory aggravating circumstances, no federal error occurs when a properly instructed jury unanimously recommends a death sentence and the state supreme court independently reweighs the sentence without regard to the impermissible factors. *Id.* at 86-87.

Each of those holdings is relevant to Corcoran's case and apply with special force given the standards of AEDPA.

The similarities between *Goode* and *Corcoran* are striking. Both Goode and Corcoran murdered multiple victims: Goode murdered only two victims on separate occasions and in separate states, while Corcoran murdered four victims on a single occasion. In both Florida and Indiana, capital sentencers are not permitted to consider a defendant's future dangerousness as an aggravating circumstance justifying the death penalty. At their oral sentencings, the trial courts in both *Goode* and *Corcoran* referred to the likelihood that the

defendants would murder again if given the chance. Both courts described the crimes as "heinous." Both courts offered those remarks as justification of their respective weighing of the proper, statutory aggravating circumstances. Finally, both the Florida and Indiana supreme courts concluded that the defendants' death sentences comported with their state laws regarding non-statutory aggravating circumstances because they were offered in the context of explaining why the proper aggravating circumstances were entitled to the weight the trial courts gave them. *Compare Goode v. Wainwright*, 410 So.2d 506, 508-09 (Fla. 1982) (finding that the trial court's consideration of future dangerousness during sentencing "explained why the result of his weighing process was proper."), *with Corcoran I*, 739 N.E.2d at 656-57 (quoting the trial court's oral and written sentencing statements and remanding for the trial court to clarify its reasoning and avoid non-statutory aggravating circumstances), *and* App. 131a (the trial court's order upon remand explaining its oral remarks within the overall context of sentencing), *and* App. 112a-113a (Indiana Supreme Court accepting the trial court's clarification that it only relied upon statutory aggravating circumstances).

The most striking difference between these two cases is the result: the Seventh Circuit granted habeas relief to Corcoran for the same reasons this Court rejected it in its pre-AEDPA decision in *Goode*. That is true whether the Court views the claim to be one of legal or factual error. *Compare* App. 5a-7a, 144a-145a (Seventh Circuit treating the issue as a factual error), *with Goode*, 464 U.S. at 83-87

(alternatively evaluating the claim as legal and factual error).

The Court should grant this petition to reaffirm the proper scope of habeas review with respect to these claims. Further, it should hold that federal courts must respect a state supreme court's determination of state law, and require habeas courts to defer to a state court's resolution of factual questions on an ambiguous record.

II. The Seventh Circuit exceeded habeas jurisdiction by granting relief based upon its view, contrary to the state supreme court, that the trial court violated state law

The Seventh Circuit lacked subject-matter jurisdiction to entertain Corcoran's non-statutory aggravating circumstances claim because that claim has no federal law component. Federal courts have jurisdiction to review State court judgments "only on the ground that [a State prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension." *Goode*, 464 U.S. at 83-84 (*citing Engle v. Isaac*, 457 U.S. 1141 (1982), and *Smith v. Phillips*, 455 U.S. 209 (1982)).

A. If a state supreme court decides that state law was not violated by a trial court's consideration of aggravating facts, there can be no federal constitutional violation

It is well-settled—a fact acknowledged by the Seventh Circuit (App. 7a)—that the consideration of non-statutory aggravating circumstances is not a violation of federal law. *See Zant v. Stephens*, 462 U.S. 862, 878 (1983) (permitting their use under federal law). Consequently, the federal Constitution is unconcerned with so-called non-statutory aggravating circumstances so long as their consideration is not "so wholly arbitrary as to offend the Constitution." *Barclay v. Florida*, 463 U.S. 939, 950-51 (1983). In other words, consideration of an improper aggravating circumstance must "so infect the balancing process created by the [State] statute that it is constitutionally impermissible for the [State courts] to let the sentence stand." *Goode*, 464 U.S. at 86 (*citing Barclay*, 463 U.S. at 956).

While the Court has not defined the precise contours of this general rule—thus making Corcoran's burden even heavier under AEDPA, *see Renico v. Lett*, 559 U.S. ___, 130 S. Ct. 1355 (2010) ("The more general the rule . . . the more leeway courts have in reaching outcomes in case-by-case determinations")—it has clearly established that the prerequisite to any such claim is that state law was actually violated. *Goode*, 464 U.S. at 84. Moreover, if a state supreme court has decided that a trial court's particular actions comport with state law, then that conclusion is definitive and binding on a

federal habeas court. *Id.* In such a circumstance, once the state supreme court's legal "conclusion that the death sentence was consistent with state law is accepted, the [alleged] constitutional violation . . . dissolves." *Id.*

Additionally, both of the other circuits to have considered this issue after *Goode* agree that habeas courts may not override a state supreme court's decision that a sentencing court did not violate state law when finding and weighing aggravating circumstances. *Fox v. Coyle*, 271 F.3d 658, 667 (CA6 2001), *reh'g and reh'g en banc denied, cert. denied*; *Alvord v. Wainwright*, 725 F.2d 1282, 1284-86 (CA11 1984). The Seventh Circuit stands alone in doing the opposite.

B. The Seventh Circuit rejected the state supreme court's finding that sentencing comported with state law

The Indiana Supreme Court held that the manner in which the trial court considered the alleged non-statutory aggravating circumstances comported with Indiana law. App. 111a-113a. Nevertheless, the Seventh Circuit reevaluated the State law claim for itself and found that Indiana law was violated, necessitating federal habeas intervention (based on an unexplored, undefined theory of federal rights). App. 6a-7a, 144a-145a.

Although the Seventh Circuit framed its discussion of this claim as an erroneous factual determination by the Indiana Supreme Court regarding the conduct of the state trial court, the

Seventh Circuit's actual problem was with the state supreme court's understanding of Indiana law. Indiana law permits sentencers to consider the facts of the crime and character of the offender when sentencing a defendant to death, so long as those facts are used to determine the relative weight of the aggravating and mitigating circumstances rather than the circumstances themselves. *Corcoran I*, 739 N.E.2d at 657 ("the circumstances of a crime often provide 'an appropriate context for consideration of the alleged aggravating and mitigating circumstances'") (*quoting Prowell v. State*, 687 N.E.2d 563, 567-68 (Ind. 1997), *reh'g denied*). The trial court clearly stated the purpose for which it used the purported non-statutory aggravating circumstances, and the Indiana Supreme Court approved that use. For the purposes of habeas review, the Seventh Circuit was required to accept that approval under Indiana law. *Goode*, 464 U.S. at 84.

The Seventh Circuit, however, rejected that state court determination of state law and ruled in diametric opposition to the Court's instructions in *Goode*. Again, *Goode* held that, even under *de novo* review (much less the highly deferential AEDPA standard applicable here), habeas relief is unavailable when a state supreme court determines that a trial court has satisfied state law regarding consideration of non-statutory aggravating circumstances when imposing a sentence of death. *Id.* The Seventh Circuit's decision flouting the teaching of *Goode* may even warrant summary reversal.

III. The Seventh Circuit substituted its view of the record for the Indiana Supreme Court's finding on the trial court's use of non-statutory aggravators

Even if the Seventh Circuit properly viewed Corcoran's amorphous federal claim as proceeding from a factual dispute about what the trial court actually did with respect to non-statutory aggravators, it erred by reweighing the record for itself. Instead, it should have deferred to the Indiana Supreme Court's factual finding that the trial court did not utilize additional facts not specified by statute as aggravating circumstances.

Whether reviewed under the pre- or post-AEDPA standards, the decision below failed to accord requisite deference to the state court's factual determinations. Before AEDPA, federal habeas courts could not overturn a state court's factual conclusion that was "fairly supported by the record." *Goode*, 464 U.S. at 85. In *Goode*, a record remarkably similar this one, this Court reversed the Eleventh Circuit for not affording the Florida Supreme Court due deference in its factual findings regarding Goode's sentencing. As here, the *Goode* record was "at best ... ambiguous." *Id.* In such situations, habeas courts cannot substitute their view of the facts for those of state supreme courts. *Id. See also Sweet v. Delo*, 125 F.3d 1144, 1157 n.17 (CA8 1997) (citing *Goode*, "In light of the deference we owe to the state courts, we do not see how we may determine that the reason for the trial court's action was something other than what the court said

it was."). Yet that is precisely what the Seventh Circuit did here.

Applying the deferential lens of AEDPA, the Indiana Supreme Court's factual findings cannot be overturned by a habeas court unless they are objectively unreasonable in light of the evidence presented to the state court. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). That standard is significantly higher than the "fairly supported" standard governing the pre-AEDPA *Goode* case. *See Goode*, 464 U.S. at 85 (discussing the old standard under then-28 U.S.C. § 2254(d)(8)).

The Court of Appeals purported to apply 28 U.S.C. § 2254(d)(2), but the panel decision did not actually undertake such an analysis; rather, it simply concluded that the standard had been met because it read the record differently. App. 6a. That is not enough without clear and convincing evidence rebutting the presumption that the trial court did what it said it did. 28 U.S.C. § 2254(e)(1). All the Seventh Circuit did, however, was reach an opposite conclusion than did the Indiana Supreme Court on the same "ambiguous" record. *See Goode*, 464 U.S. at 85.

IV. Even if state law were violated here, no federal law violation occurred because Corcoran's sentence is not arbitrary given other safeguards

1. Even assuming, *arguendo*, that the state courts made unreasonable factual determinations, habeas relief cannot be granted absent a violation of

federal law. "It is axiomatic that federal courts may intervene in the state judicial process only to correct wrong of a constitutional dimension." *Id.* at 83.

When a state court considers an aggravating circumstance that is improper under state law (but not federal law), the only question for habeas courts "is whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by the [state] statute that it is constitutionally impermissible for the [state supreme court] to let the sentence stand." *Id.* at 86 (*quoting Barclay*, 463 U.S. at 956). *Goode* held that because a properly instructed jury recommended a death sentence and the Florida Supreme Court conducted its own review of the aggravating and mitigating circumstances to independently find the sentence proper, there was no risk that the weighing process was so infected. *Goode*, 464 U.S. at 86-87.

The same analysis applies here. The statutory capital sentencing schemes in Florida and Indiana are essentially the same. *Judy v. State*, 416 N.E.2d 95, 105 (Ind. 1981). Corcoran's jury recommended execution after finding unanimously that Corcoran committed multiple murders and that the mitigating circumstances were outweighed by the aggravating circumstance. Trial R. 2525-29. The Indiana Supreme Court independently revisited Corcoran's death sentence and found it to be the most appropriate sentence. App. 116a-120a. Corcoran has never suggested that the Indiana Supreme Court considered non-statutory aggravating circumstances in its independent reweighing. "Consequently, there is no sound basis for

concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment." *Goode*, 464 U.S. at 87.

2. Finally, the Seventh Circuit has suggested that the State has waived any reliance upon *Goode* because it had not cited the case to the courts below. App. 145a. This is erroneous also. In his petition for a writ of habeas corpus, Corcoran offered no citations to any caselaw in regard to his non-statutory aggravating circumstances claim and offered only a perfunctory argument in support. In response, the State argued in part that,

> This claim fails to establish any constitutional deficiency in Indiana Supreme Court's review of the trial court's treatment of Corcoran's sentence on remand, let alone does it show that the state supreme court's judgment is in any way inconsistent with applicable United States Supreme Court precedent. Therefore, Corcoran's claims alleging deficiencies in the record are without merit pursuant to 28 U.S.C. § 2254(d).

Memorandum in Support of Return to Order to Show Cause, *Corcoran v. Buss*, No. 3:05-cv-389-AS-CAN, at 16 (N.D.Ind. Aug. 11, 2006) (Docket Entry 33). While the State did not cite *Goode*, it did not have to because Corcoran bore the burden to prove what federal law was violated. The State's argument in the district court, that Corcoran made no showing that the Indiana courts had violated clearly established precedent of this Court, is identical to Petitioner's argument on appeal and in this petition:

Indiana courts did not violate federal law in the finding or weighing of aggravating circumstances.

Against the urging of Corcoran[1], the Seventh Circuit did not give the parties opportunity to brief the merits of Corcoran's claims in that Court. Rather, the only opportunity for the parties to inform that court of their arguments on the merits came on rehearing briefing, in which Petitioner relied heavily on *Goode* and other authority. *See* Petition for Rehearing and Rehearing En Banc, *Corcoran v. Levenhagen*, No. 07-2093 (CA7 Feb. 24, 2010). Consequently, the Seventh Circuit's implication that the State has waived any reliance on *Goode* (App. 144a-145a) is incorrect. The State has preserved all of its arguments in all courts below.

* * *

The Seventh Circuit failed to recognize that whether the trial court's sentencing statement complied with state law regarding non-statutory aggravating circumstances is entirely outside the purview of a federal habeas court and has no Eighth or Fourteenth Amendment implications. *Goode*, 464 U.S. at 84. The facts and law governing the merits of his claim are materially indistinguishable from

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[1] *See* Corcoran's Circuit Rule 54 Statement of Position, *Corcoran v. Levenhagen*, No. 07-2093 (CA7 Dec. 14, 2009) (Docket Entry 51). That statement was properly limited to the procedural issue of how to proceed following this Court's October 2009 remand, and not on the merits of the underlying claims. *See also* Seventh Circuit Rule 54.

Goode. The Seventh Circuit's decision stands in irreconcilable conflict with this Court's clearly established precedent and the decisions of other circuits. Coupled with the deferential commands of AEDPA, Corcoran cannot obtain relief on this record. The Court should grant this petition, reverse the judgment below, and reinstate Corcoran's sentence.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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Dated: July 13, 2010

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In the
United States Court of Appeals
For the Seventh Circuit

Nos. 07-2093 and 07-2182

JOSEPH E. CORCORAN,
Petitioner-Appellee/
Cross-Appellant,

v.

MARK LEVENHAGEN, Superintendent,
Respondent-Appellant/
Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Indiana, South Bend
Division.
No. 05 C 389—**Allen Sharp**, *Judge.*

SUBMITTED DECEMBER 14, 2009—DECIDED
JANUARY 27, 2010

Before BAUER, WILLIAMS and SYKES, *Circuit Judges.*

BAUER, *Circuit Judge.* Joseph Corcoran murdered four people, and an Indiana court sentenced him to death. The district court granted habeas relief on Corcoran's Sixth Amendment claim. We reversed on the Sixth Amendment issue, *Corcoran v. Buss*, 551 F.3d 703 (7th Cir. 2008), but as the Supreme Court explained, we improperly omitted discussion of Corcoran's other habeas challenges. *Corcoran v.*

Levenhagen, No. 08-10495, 2009 WL 3347947, at *1 (U.S. Oct. 20, 2009). We include that discussion here, after a full and fresh look at the record. We find that all of Corcoran's remaining habeas challenges are waived, and that three of them are frivolous, but that one of the challenges nevertheless entitles him to a new sentencing hearing.

I. BACKGROUND

We assume familiarity with the facts surrounding Joseph Corcoran's murders and the path Corcoran traversed through the state and federal court systems, all of which we recounted in our prior decision. *See Corcoran*, 551 F.3d at 704-08. That decision found that Corcoran's death sentence did not violate his jury trial rights under the Sixth Amendment, and that Corcoran was competent to waive state post-conviction proceedings. *Id.* at 712, 714. But the decision omitted discussion of four other challenges that Corcoran raised in the district court, that the district court failed to address, and that Corcoran did not appeal in this court although he was a cross-appellant, having cross-appealed a separate challenge. Those four challenges, which the Supreme Court advises us to either address ourselves or remand for the district court to consider, are that: (1) the Indiana trial court improperly considered non-statutory aggravating circumstances and failed to consider six mitigating circumstances; (2) Indiana's capital sentencing statute was unconstitutional; (3) the prosecution committed misconduct in the closing argument to the sentencing jury; and (4) Corcoran should not be

executed because he suffers from a mental illness. *Corcoran*, 2009 WL 3347947, at *1; *see* Habeas Pet. at 10-13, 14-15.

II. DISCUSSION

A preliminary issue on remand from the Supreme Court, and the only issue that Corcoran addresses under Circuit Rule 54, as his "position as to the action which ought to be taken by this court on remand," is whether we should address his remaining habeas challenges ourselves or remand to the district court.

The Supreme Court explicitly gave us a choice. *See Corcoran*, 2009 WL 3347947, at *1 ("The Seventh Circuit should have permitted the District Court to consider Corcoran's unresolved challenges to his death sentence on remand, or should have itself explained why such consideration was unnecessary."); *cf. Cone v. Bell*, 129 S.Ct. 1769, 1786 (2009) (ordering a remand to the district court). Sometimes we have chosen, after reversing a district court's grant of habeas relief, to address remaining habeas challenges not addressed by the district court ourselves, *Sprotsy v. Buchler*, 79 F.3d 635, 645 (7th Cir. 1996), and sometimes we have remanded. *Stewart v. Peters*, 958 F.2d 1379, 1388 (7th Cir. 1992); *Clark v. Duckworth*, 906 F2d 1174, 1179 (7th Cir. 1990). The decision whether to remand in these circumstances is discretionary. *See Corcoran*, 2009 WL 3347947, at *1; *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is

one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.").

We exercise our discretion here to decide the merits ourselves, because Corcoran's remaining challenges are rudimentary to the point of requiring no additional briefing, we are equally positioned with the district court to reach a disposition based on a full review of the present state court record, and a review by the district court would at any rate be subject to our review de novo. *See Cone*, 129 S.Ct. at 1792 (Alito, J., concurring in part and dissenting in part); *Lonchar v. Thomas*, 517 U.S. 314, 320 (1995) (noting that appellate courts may "expedite proceedings on the merits"); Circuit Rule 22(d)(3) ("The merits of an appeal may be decided summarily if the panel decides that an appeal is frivolous."). In short, a remand to the district court is "unnecessary." *Corcoran*, 2009 WL 3347947, at *1.

Nor do we lack jurisdiction to rule on the merits. We have jurisdiction to take an appeal from the district court's decision—granting habeas relief on less than all the claims in Corcoran's multi-claim petition without adjudicating the remaining claims seeking the same relief—because it was a "final order." 28 U.S.C. § 2253. *See, e.g., Sprotsy v. Buchler*, 79 F.3d 635, 645 (7th Cir. 1996) (collecting cases). It matters not that a certificate of appealability was granted in this case, *Corcoran v. Buss*, No. 3:05-CV-389 (N.D. Ind. May 17, 2007), but not with respect to the remaining claims. *See Owens v. Boyd*, 235 F.3d 356,

358 (7th Cir. 2001) ("[A] defect in a certificate of appealability is not a jurisdictional flaw.").

So we proceed with the merits of Corcoran's additional habeas challenges. Arguments not raised on appeal or cross-appeal are waived. *See* Fed. R. App. P. 28.1(c)(2); *United States v. Johnson*, 335 F.3d 589, 592 (7th Cir. 2003); *United States v. Berkowitz*, 927 F.2d 1376, 1391 (7th Cir. 1991); *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986). Corcoran as cross-appellant failed to appeal the four claims and thus he waived them.

Nevertheless, we may consider Corcoran's challenges for plain error, because "in exceptional circumstances, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936). For most of Corcoran's challenges we find no plain error, so we need not decide whether they present exceptional circumstances. But for one challenge, which we discuss first, we think that the state trial court's decision resulted in two obviously unreasonable fact determinations entitling Corcoran to a new sentencing hearing.

A. Sentencing Process

Corcoran claimed that the Indiana trial court considered non-statutory aggravating circumstances, —i.e., Corcoran's future dangerousness, his victims' innocence, and the murders' heinousness—in

contravention of state law. *See Bivins v. State*, 642 N.E.2d 928, 955-56 (Ind. 1994) (outlawing the use of non-statutory aggravating circumstances under Indiana state law). The trial court disagreed, stating that "in balancing the proved aggravators and mitigators, [the trial court] emphasizes . . . that it only relied upon those proven statutory aggravators." *See Corcoran v. State*, 774 N.E.2d 495, 498 (Ind. 2002) (quoting the trial court).

But this finding of fact, that the trial court did not consider non-statutory aggravators in the balancing process used to determine Corcoran's death sentence, was obviously in error, if we are to believe what the trial court added next. Specifically, it stated that its "remarks at the sentencing hearing, and the language in the original sentencing order,"—both regarding the use of the three non-statutory aggravators about which Corcoran complained—"*explain why such high weight was given to the statutory aggravator* of multiple murder." *See id.* (emphasis added). In other words, the court added weight to a statutory aggravator based on the non-statutory aggravators. And factor weighting is part of factor "balancing," the very process in which the trial court disclaimed reliance on non-statutory aggravators. So unlike the Indiana Supreme Court, we are far from "satisfied that the trial court has relied only on aggravators listed in Indiana Code § 35-50-2-9(b)." *Corcoran v. State*, 774 N.E.2d 495, 499 (Ind. 2002). Indeed, we find this an "unreasonable determination of the facts" in light of the trial court's proceedings, thus warranting habeas relief. 28 U.S.C. § 2254.

Nothing in this opinion prevents Indiana from adopting a rule, *contra Bivins*, 642 N.E.2d at 955-56, permitting the use of non-statutory aggravators in the death sentence selection process. *See Zant v. Stephens*, 462 U.S. 862, 878 (1983) (permitting their use under federal law). But the state trial court must reconsider its sentencing determination, and this time may not find, contrary to logic, that it both did and did not consider non-statutory aggravating circumstances when it sentenced Corcoran to death.

Also, the trial court should address Corcoran's age (at the time of the murders, he was twenty-two) as a mitigating factor in order to cure a different fact-finding error by the Indiana Supreme Court. Corcoran claimed that the Indiana trial court failed to consider six of the ten mitigating circumstances Corcoran proffered: (1) his age; (2) his substantially impaired ability to appreciate the criminality of his conduct or to conform that conduct with the requirements of the law; (3) his inability to competently assist in his defense; (4) his forethought to protect his seven-year-old niece during the murders; (5) his good behavior in jail before sentencing; and (6) his admission of guilt "at all stages of the legal process" including the trial. When the trial court first sentenced Corcoran, it explicitly discussed and rejected the last five of these mitigators—but not Corcoran's age—as either false or non-mitigatory. *State of Indiana v. Corcoran*, No. 02D04-9707-CF-465, at 3-6 (Ind. Super. Ct. Aug. 26, 1999). When the Indiana Supreme Court later advised it to clarify only whether it had used non-statutory aggravators, it is unsurprising that the

trial court declined to reiterate its analysis of the five mitigators it had previously rejected. But at *no* time did the trial court offer an explanation for rejecting Corcoran's age as non-mitigatory, as was required by Indiana law. *See Corcoran*, 774 N.E.2d at 501 (requiring the trial court to "list specific facts and reasons that led the court to finding [mitigating circumstances'] existence"). Thus, the Indiana Supreme Court's finding of fact, that the trial court "analyzed" and "rejected" Corcoran's age in its sentencing order, *id.* at 500, was obviously in error, because the sentencing order makes no mention of Corcoran's age except to note that Corcoran proffered it as a mitigator.

Nor did the Indiana Supreme Court cure this oversight by itself evaluating Corcoran's age as a mitigator. *See Clemons v. Mississippi*, 494 U.S. 738, 748-49 (1990) (finding that a state appellate court satisfies the constitutional requirement of an individualized and reliable sentencing determination in capital cases by itself weighing aggravating and mitigating circumstances). In weighing and rejecting Corcoran's age as non-mitigatory, the Indiana Supreme Court found dispositive that "Corcoran [was] well past the age of sixteen where the law requires special treatment" and thus that the trial court had not "abuse[d] [its] discretion." *Corcoran*, 774 N.E.2d at 500; *cf. Roper v. Simmons*, 543 U.S. 551 (2005) (raising the minimum death-eligible age to eighteen). But as we discussed above, the trial court had not exercised any "discretion." Rather, it had failed altogether to intimate any consideration of Corcoran's age. Thus, in erroneously finding once

again that the trial court had exercised its discretion, the Indiana Supreme Court weighted Corcoran's age under an abuse-of-discretion standard, rather than the more searching standard required under Indiana law. *See Monegan v. State*, 756 N.E.2d 499, 504 (Ind. 2001) ("Focusing on chronological age, while often a shorthand for measuring culpability, is frequently not the end of the inquiry for people in their teens and early twenties. . . . There are both relatively old offenders who seem clueless and relatively young ones who appear hard and purposeful.").

Again, nothing in this opinion prevents Indiana from adopting a rule, *contra Corcoran*, 774 N.E.2d at 501, permitting a court to take account of mitigating factors that have been properly admitted into evidence, without explicitly discussing its consideration of those factors on the record. *See, e.g.*, *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (requiring only that the sentencer be *able* to give adequate mitigating effect to mitigating evidence). And nothing in this opinion prevents Indiana from finding Corcoran's age irrelevant to selecting his death sentence. *See Roper*, 543 U.S. 551. But as the state trial court conducts its new sentencing hearing, to rectify the fact-finding error with respect to non-statutory aggravators discussed above, it should also discuss whether it finds Corcoran's age to be a mitigating circumstance. This will prevent non-compliance with Indiana law, and—more pertinent to our inquiry on federal habeas review—cure the Indiana Supreme Court's "unreasonable

determination of the facts" in light of the trial court's proceedings. 28 U.S.C. § 2254.

B. Indiana's Capital Sentencing Statute

At this point, we could remand to the district court with instructions to grant Corcoran's habeas petition, and call it a day. But that would allow Corcoran's remaining habeas challenges to continue languishing unadjudicated, a scenario we have cautioned against. Indeed, we have advised that "the better practice in habeas corpus death cases is for the judge to rule on *all* the grounds presented in the petition." *Stewart*, 958 F.2d at 1388.

So we proceed with Corcoran's next claim, that Indiana's capital sentencing statute was unconstitutional under the Eighth Amendment's prohibition on cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process, because the statute's factors for determining whether one is eligible for the death penalty "subject a defendant to life without parole or death," thus providing "no guidance to differentiate between life or death." Habeas Pet. at 11-12. The statute at the time of Corcoran's sentence provided, and now also provides, that a defendant "may be sentenced to (1) death; or (2) life imprisonment without parole," if the state "prove[s] beyond a reasonable doubt the existence of at least one . . . aggravating circumstance[ ]." Ind. Code. §§ 35-50-2-3, 9 (1993). Because the eligibility factors subject a defendant to either death or life imprisonment without parole, Corcoran argued, "the Indiana legislature is

equating the penological purposes between the two penalties," thus failing to provide "constitutionally required narrowing." Habeas Pet. at 11.

It is true that death penalty statutes must adequately narrow the class of persons eligible for death. Thus, the Supreme Court has invalidated statutes providing juries with untrammeled discretion to impose the death penalty, *Furman v. Georgia*, 408 U.S. 238 (1972), or guiding juries' discretion with overly vague aggravating circumstances. *Godfrey v. Georgia*, 446 U.S. 420 (1980). But Corcoran made no challenge to the existence or nature of the then thirteen aggravating circumstances used to narrow the class of persons eligible for death. Rather, he challenged only that the existence of at least one of those circumstances made him eligible not only for death, but also for life without parole. It matters not whether the statute says that a defendant may be sentenced to "death or life imprisonment without parole," as the statute reads, or simply "death," as Corcoran would have it. In both cases, the door has been opened so that a defendant may be sentenced to either. Thus, Corcoran's eligibility challenge lacks merit, because the semantic changes he would make to the statute's language on eligibility would have no effect on its meaning.

Nor does it matter that death and life without parole are "dueling options" for selection once a defendant is found eligible. Habeas Pet. at 11-12. The Indiana statute provides that a jury may impose either death or life without parole upon finding (1) an

aggravating circumstance, and (2) that aggravating circumstances outweigh any mitigating circumstances. Ind. Code §§ 35-50-2- 9(e), (l). In other words, the statute guides the jury in imposing death or life without parole, but it affords no guidance on how to choose between the two. But these "dueling options" are not the sort of "untrammeled discretion to impose or withhold the death penalty" that the Constitution prohibits. *Gregg v. Georgia*, 428 U.S. 153, 195 n.47 (1976) (citing *Furman*, 408 U.S. 238). Rather, the Supreme Court upheld in *Gregg* a scheme where the jury, as an alternative to death, "may fix the penalty at life imprisonment, if you see fit to do so, for any reason satisfactory to you or without any reason." Ga. Suggested Pattern Jury Instruction 2.15.50 (2009) (cited as existing when *Gregg* was decided in Linda E. Carter, Ellen S. Kreitzberg, and Scott W. Howe, *Understanding Capital Punishment Law* 155 (2d ed. 2008)). In sum, "the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." *Gregg*, 428 U.S. at 203.

Corcoran also claimed that the statute is unconstitutional because it "informs the jury that a death sentence acts as an act of mercy in comparison to the life without parole sentence." Habeas Pet. at 12. But the statute does no such thing. Rather, as Corcoran admits, the statute offers "no guidance to differentiate between life or death" once a defendant

is found eligible, *id.*, which as discussed above is constitutional under *Gregg*.

Finally, Corcoran argues that the statute "penalizes individuals for presenting mitigation." *Id.* Again, the statute does no such thing. Rather, it encourages defendants to present mitigating circumstances, because if enough of them outweigh the aggravating circumstances then a jury is barred from sentencing a defendant to death or life without parole. Ind. Code §§ 35-50-2-9(e), (l).

C. Prosecution's Closing Argument at Sentencing

Corcoran further claimed that he was deprived of due process when the prosecutor made five statements to the sentencing jury at closing argument. One statement, according to Corcoran, improperly "speculat[ed] on what a victim imagined or said: '[W]e imagine that last victim must gasp for breath, must grasp for mercy.' " Habeas Pet. at 12. Another statement "speculated on future dangerousness and misdefined life without parole in stating '[Corcoran] is not a man we want back on our streets in his lifetime.' " *Id.* Two others "speculated on victim opinion as to the appropriate sentence[:]

> I can hear all four of them, Jim, Scott, Tim, and Doug[;] their souls, their very life blood spilled in that home cries out for equality, justice. And you know we can never fully give those men that equality of justice and do you know why? Because this man has only one life to give for the four he took. . . .

> I think I can still hear Jim and Tim and Doug and Scott and you know what; they don't ask us for revenge, they ask again for the equality of justice and that equality of justice comes with retribution."

Id. at 12-13. And the fifth statement "describe[d] Petitioner as a dangerous individual who placed all people in danger including the jury: 'Innocent lives are expendable. All of us.'" *Id.* at 13.

These arguments about the prosecution's closing argument are waived for the additional reason that Corcoran never raised them in state court. *See Corcoran v. State*, 739 N.E.2d 649, 655 (Ind. 2000). By raising the argument for the first time with the district court, Corcoran procedurally defaulted his claim. *See* 28 U.S.C. § 2264.

Corcoran points to no cause for this procedural default, so we will not grant habeas relief unless the prosecutor's arguments resulted in "a fundamental miscarriage of justice." *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). We find no miscarriage of justice here, as the prosecutor's statements are not the type of constitutional error that would render Corcoran ineligible for the death penalty. *Id.* at 341, 347.

D. Incompetence To Be Executed

Finally, Corcoran claimed he should not be executed because he suffers from a mental illness. Indeed, the Constitution prohibits the execution of a prisoner

who is insane. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986); *see also Panetti v. Quarterman*, 551 U.S. 930 (2007). But Corcoran must raise the argument of his incompetence to be executed in Indiana's state courts before he can do so here. 28 U.S.C. § 2254(b)(1). Indeed, Corcoran made no claim that Indiana lacks an effective process to comply with *Ford v. Wainwright*. To the contrary, Indiana permits additional post-conviction review on *Ford* claims "after the usual channels of appeal have been exhausted." *Baird v. State*, 833 N.E.2d 28, 29 (Ind. 2005); *see also* Ind. Post-Conviction Rule 1(12) (allowing a successive habeas petition "if the petitioner establishes a reasonable probability that the petitioner is entitled to post-conviction relief"). Therefore, his *Ford* claim is unripe.

III. CONCLUSION

The habeas claims actually before this court are meritless, as we previously found in *Corcoran*, 551 F.3d 703. The claims Corcoran declined to pursue in this court are waived, and three of them are anyway meritless or unripe. But Corcoran's challenge to the state trial court's sentencing process has obvious merit, for the reasons discussed above. Therefore, we AFFIRM the district court's conditional grant of Corcoran's petition for a writ of habeas corpus, but we modify its order to grant the writ unless within 120 days the state court holds a new sentencing hearing in accordance with this opinion.

SUPREME COURT OF THE UNITED STATES

JOSEPH E. CORCORAN *v.* MARK LEVENHAGEN, SUPERINTENDENT, INDIANA STATE PRISON

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 08-10495. Decided October 20, 2009

PER CURIAM.

An Indiana jury convicted Joseph Corcoran of four counts of murder. Corcoran was sentenced to death. After Corcoran's challenges to his sentence in the Indiana courts failed, he sought federal habeas relief. Corcoran argued in his federal habeas petition that: (1) the Indiana trial court committed various errors at the sentencing phase; (2) his sentence violated the Sixth Amendment; (3) Indiana's capital sentencing statute was unconstitutional; (4) the prosecution committed misconduct at sentencing; and (5)he should not be executed because he suffers from a mental illness. See *Corcoran* v. *Buss*, 483 F. Supp. 2d 709, 719, 726 (ND Ind. 2007). The District Court granted habeas relief on Corcoran's claim of a Sixth Amendment violation, and ordered the state courts to resentence Corcoran to a penalty other than death. *Id.*, at 725–726. The District Court did not address Corcoran's other arguments relating to his sentence, noting that they were "rendered moot" by the order that Corcoran be resentenced because of the Sixth Amendment violation. *Id.*, at 734.

The Seventh Circuit reversed the District Court's Sixth Amendment ruling. *Corcoran* v. *Buss*, 551 F. 3d 703, 712, 714 (2008). Then, without mentioning

Corcoran's other sentencing claims, the Seventh Circuit remanded "with instructions to deny the writ," stating that "Indiana is at liberty to reinstate the death penalty." *Id.*, at 714. Corcoran sought rehearing, arguing that the Court of Appeals should have allowed the District Court to consider his additional attacks on his sentence. But the Court of Appeals denied rehearing, again without referring to Corcoran's undecided claims.

We now grant certiorari and hold that the Seventh Circuit erred in disposing of Corcoran's other claims without explanation of any sort. The Seventh Circuit should have permitted the District Court to consider Corcoran's unresolved challenges to his death sentence on remand, or should have itself explained why such consideration was unnecessary.

In its brief in opposition, the State argues that Corcoran's claims were waived, and that they were in any event frivolous, so that a remand would be wasteful. Brief in Opposition 9–10. Nothing in the Seventh Circuit's opinion, however, suggests that this was the basis for that court's order that the writ be denied.

The petition for certiorari and the motion for leave to proceed *in forma pauperis* are granted. The judgment of the Court of Appeals for the Seventh Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

United States Court of Appeals,
For the Seventh Circuit.

Nos. 07-2093 and 07-2182.

Joseph E. CORCORAN,

Petitioner-Appellee/
Cross-Appellant,

v.

Edwin G. BUSS, Superintendent,

Respondent-Appellant/
Cross-Appellee.

Argued Dec. 3, 2007—Decided Dec. 31, 2008.

Rehearing and Suggestions for Rehearing En Banc Denied Feb. 24, 2009.

Before BAUER, WILLIAMS and SYKES, Circuit Judges.

BAUER, Circuit Judge.

On July 26, 1997, Joseph Corcoran shot and killed four men: his brother Jim Corcoran, his sister's fiancé Robert Scott Turner, Timothy Bricker, and Doug Stillwell. An Indiana state court jury convicted Corcoran of four counts of murder. The trial court agreed with the jury's determination and sentenced Corcoran to death. Corcoran exhausted his state court direct appeals and waived state post-conviction review. In 2005, Corcoran filed a petition for a writ

of habeas corpus in the United States District Court for the Northern District of Indiana, claiming that his Sixth Amendment right to a jury trial was violated by an offer made by the State during pretrial negotiations, which in turn tainted his death sentence. The district court granted his petition. The State now appeals the district court's grant of habeas relief; Corcoran cross-appeals from the district court's decision that Corcoran was competent to waive his state post-conviction proceedings. For the following reasons, we affirm the district court's finding of competence, but we reverse the grant of habeas relief.

I. BACKGROUND

After Corcoran was indicted for four counts of murder under Ind.Code § 35-42-1-1, the State and Corcoran participated in extensive negotiations regarding the possibility of a plea agreement. The State made two offers: (1) a sentence of life without the possibility of parole in exchange for a plea of guilty, or (2) the dismissal of a request for the death penalty in exchange for Corcoran's agreement to proceed by bench trial instead of jury trial. Corcoran was advised by his counsel (during "several hundred" hours of meetings) that the offers were in his best interest for a number of reasons: (1) Corcoran had made a videotaped confession of the crimes; (2) his confession matched the physical evidence at the crime scene; (3) two of the three court-ordered psychiatrists that evaluated Corcoran concluded that he was competent to stand trial and to aid in his defense; and (4) defense counsel planned

to present no defense at trial. Corcoran could not give a specific reason why he was unwilling to accept either offer, stating "I just feel like I should go to trial," and that he could not explain why.[1] Negotiations lasted for approximately nine months, after which the State withdrew its offers and filed four applications for the death penalty.

Before trial, defense counsel gave notice to the court that an insanity defense would be asserted; after court-appointed doctors examined Corcoran and concluded that he was competent, defense counsel withdrew its claims. A jury found Corcoran guilty

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1 At the request of defense counsel, an experienced Indiana Public Defender met with Corcoran to make sure he understood the offer made by the State to dismiss the death penalty in exchange for agreeing to a bench trial. She explained to Corcoran that she was "unaware of any other capital murder defendant to whom the prosecution had extended a pre-trial offer to dismiss the death penalty without requiring a guilty plea in exchange," and that "he would still have the opportunity to present evidence and [argue] for a sentence less than life without parole, without facing the risk of a greater sentence." The defense also arranged a meeting between Corcoran and a Public Defender in Marion County, who discussed the logic of why the offers were in Corcoran's best interest. Despite the lengthy discussions, Corcoran offered no specific reason for rejecting the offers, other than he had a "feeling" that he should go to trial.

and recommended the death penalty. On August 26, 1999, the district court sentenced Corcoran to death.[2]

On direct appeal, Corcoran filed a written waiver of his right to appeal his convictions and challenged only his death sentence. Among the six claims that alleged the Indiana Death Penalty statute violated his state and federal constitutional rights, Corcoran argued that the statute violated his Sixth Amendment right to a jury trial in that when he declined the State's offer to proceed by a bench trial and chose to be tried by a jury, the State's request for the death penalty sought "to force [Corcoran] to abdicate a basic right," when the State actually believed that life imprisonment was the appropriate penalty. *Corcoran v. State*, 739 N.E.2d 649, 654 (Ind.2000) (*Corcoran I*). The Indiana Supreme Court rejected all of Corcoran's arguments and upheld Indiana's Death Penalty statute as it applied to him. *Id.*

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2 At the time of Corcoran's sentencing, Indiana law required the trial judge make an independent determination of whether to impose the death sentence. Ind.Code § 35-50-2-9(e); *Lowery v. Anderson*, 225 F.3d 833, 842 (7th Cir.2000). The statute was amended in 2002, in light of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), to make the jury's decision final. See Act of Mar. 26, 2002, Pub.L. No. 117-2002, 2002-2 Ind. Acts 1734; *Ritchie v. State*, 809 N.E.2d 258, 263 n. 1 (Ind.2004).

In addressing Corcoran's argument that his right to a jury trial was violated, the court emphasized that, under *Bordenkircher v. Hayes,* 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), although constitutional limits do apply, the discretionary power of a prosecutor to offer plea bargains is wide. The court found that in the context of plea bargaining, there is no material distinction in these discretionary powers to agree to a lesser sentence in exchange for a guilty plea or for a bench trial. *Corcoran I,* at 654. However, the court vacated Corcoran's sentence and remanded to the trial court, finding a "significant possibility that the trial court may have relied upon non-statutory aggravating factors in deciding whether to impose the death penalty" under Indiana law. *Id.* at 657 (citing *Harrison v. State,* 644 N.E.2d 1243 (Ind.1995)). On September 30, 2001, the trial court reweighed the statutory aggravators under Ind.Code § 35-50-2-9(b)[3] FN3 and reinstated

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3 The trial court relied upon the following aggravating circumstances: Corcoran was being tried in one proceeding for committing multiple murders; the murders were committed knowingly, intentionally, and in a particularly heinous way; and the mental disturbance suffered by Corcoran did not affect his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The trial court also gave varying weight to mitigating circumstances, including the following: he was under the influence of a mental or emotional disturbance at the time of the murders; Corcoran's cooperation with

Corcoran's death sentence; the Indiana Supreme Court affirmed his sentence on September 5, 2002. *See Corcoran v. State*, 774 N.E.2d 495, 498-99 (Ind.2002) (*Corcoran II*).

Corcoran was required to file a petition for post-conviction relief in state court by September 9, 2003. In what would be the first in a series of flip-flops, he refused to sign his petition, believing that he should be put to death for his crimes. At the request of his counsel, a State Public Defender, the trial court scheduled a hearing in October, 2003, to determine whether Corcoran was competent to waive post-trial review of his conviction and sentence. Defense counsel sought the opinions of three mental health experts: clinical psychologist Dr. Robert G. Kaplan; forensic psychiatrist Dr. George Parker; and clinical neuro-psychologist Dr. Edmund Haskins. Each doctor separately interviewed Corcoran and reviewed his mental health records.

At the hearing, all three experts testified that Corcoran suffered from paranoid schizophrenia; the State and the post-conviction court acknowledged the same. According to the experts, symptoms of his disease included delusions that he had a speech disorder and a belief that prison guards were operating an ultrasound machine to torment him. On the basis of that diagnosis, the experts concluded that Corcoran was unable to make a rational

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authorities; his lack of criminal history; and his remorse.

decision concerning his legal proceedings. Each expert stated that Corcoran's decision to waive post-conviction review of his sentence, thereby hastening his execution, was premised on his desire to be relieved of the pain that he believed he was experiencing as a result of his delusions. The experts also stated that Corcoran had the capacity to understand his legal position, and Dr. Parker testified that Corcoran had a clear awareness of the status of his case and what was at stake if he waived further proceedings.

Additionally, Corcoran testified at the competency hearing, where the prosecutor and the trial judge questioned him. He stated that he understood it was his last chance at a review of the case, and that if it was unsuccessful, he would be executed. He told the judge that he never wanted a competency hearing, and that he wanted to waive his appeals because he was guilty of murder. He stated:

> I think I should be executed for what I have done and not because I am supposedly tortured with ultrasound or whatever. I am guilty of murder. I should be executed. That is all there is to it. That is what I believe. I believe the death penalty is a just punishment for four counts of murder.

In December, 2003, the post-conviction court found that Corcoran was competent to waive further challenges to his sentence and be executed. The court noted that:

> [the] evidence is clear that [Corcoran] suffers from a mental illness ... [however the issue before the court was] whether he is competent to waive post-conviction review ... [t]he dialogue the State and the Court had with [Corcoran] clearly indicate he is competent and understands what he is doing. While his choice of action may be unwise, and obviously against the advice of counsel, he is competent to make this ultimate decision in spite of his mental illness.

The Indiana Supreme Court affirmed the post-conviction court's competency determination. *See Corcoran v. State,* 820 N.E.2d 655, 662, *aff'd on reh'g,* 827 N.E.2d 542 (Ind.2005) (*Corcoran III*); In doing so, the court considered: (1) the testimony of the experts, each of whom concluded that his decision to forego post-conviction review was premised on his desire to be relieved of the delusional pain he was experiencing as a result of his mental illness; (2) the fact that Corcoran did not tell any expert that he wished to end his appeals in order to escape his delusions; (3) his prison records and expert medical testimony which revealed that his psychotic symptoms were being controlled through various psychiatric medications; (4) Corcoran's statements at the hearing that he wanted to waive his appeals; and (5) evidence that Corcoran was aware of his legal position and the consequences of his decision, such as his own testimony at the hearing as well as expert testimony that he was cognizant of his sentence and the appeals process. The court concluded that the evidence supported the trial court's determination that Corcoran had "both a

rational understanding of and can appreciate his legal position ... [and] the evidence does not conclusively indicate that Corcoran's decision was not made in a rational manner." *Id.* at 662.

On February 10, 2005, Corcoran changed his mind and attempted to file a verified state post-conviction petition, which was dismissed as untimely by the trial court; the Indiana Supreme Court affirmed the trial court on April 18, 2006, stating that "[w]e have afforded Corcoran considerable review of his sentence ... and the post-conviction court's competency determination. The public interest in achieving finality at this stage weighs heavily against further review." *Corcoran v. State,* 845 N.E.2d 1019, 1023 (Ind.2006) (*Corcoran IV*) (internal citations omitted).

On November 8, 2005, Corcoran filed an untimely petition for a writ of habeas corpus with the United States District Court for the Northern District of Indiana, raising eight claims that his constitutional rights had been violated by the proceedings that resulted in his conviction and death sentence. On December 5, 2005, Corcoran again changed his mind and filed a pro se "Petition to Halt All Future Appeals," in which he indicated that he did not wish to further challenge his convictions and sentence. On March 31, 2006, Corcoran sent a letter to the district court, stating that he only signed the post-conviction petition (filed on February 10, 2005) because he believed the Indiana Supreme Court would find him competent. He further stated that he never intended to appeal his sentence, and that he had consented to

the filing of the habeas petition in acquiescence to the requests of his wife and his attorneys. He also told the court that he fabricated the story about being tortured by an ultrasound machine in prison, and he denied that his sleep disorder was a motivation to give up on appeal. Corcoran asked the district court to accept the Indiana Supreme Court's finding that he was competent, and in essence, deny his habeas petition.

Against Corcoran's wishes, on April 9, 2007, the district court granted Corcoran's petition for habeas relief under 28 U.S.C. § 2254(d), finding the Indiana Supreme Court's holding in *Corcoran I* that the offer was within "the discretionary powers of the prosecutor" violated Corcoran's right to a jury trial under *United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), which held that a provision of the Federal Kidnapping Act, 18 U.S.C. §§ 1201 and 1202, that reserved the possibility of the death penalty exclusively for defendants who insisted on a jury trial, imposed an impermissible burden on the right to a jury trial. The district court considered both of the State's offers in adjudicating the present petition, and found that while the first offer to waive the death penalty in exchange for a guilty plea was well within prosecutorial discretion, the second offer sought to coerce Corcoran into waiving his right to a jury trial, and as such, was "objectively unreasonable" under the United States Supreme Court's decision in *Jackson. Corcoran v. Buss,* 483 F.Supp.2d 709, 723-24 (N.D.Ind.2007) (*Corcoran V*). The district court distinguished *Bordenkircher* from the instant case, by finding that

the State's second offer could not be considered in the context of plea negotiations, for the offer did not seek an admission of guilt. The district court also found that the Indiana Supreme Court, in *Corcoran III*, reasonably concluded that Corcoran was competent to waive his state post-conviction remedies. The court granted Corcoran's petition and ordered the State of Indiana to re-sentence Corcoran to a sentence other than death within 120 days. *Corcoran V*, at 734. The State appealed the grant of the habeas petition to this Court; Corcoran filed a cross-appeal, challenging the district court's conclusion that he was competent to waive his right to post-conviction review.

II. ANALYSIS

Federal courts are authorized to grant a writ of habeas corpus when an individual is held in custody under a state court decision in violation of the United States Constitution. "We review the district court's findings of fact for clear error and its legal conclusions, as well as mixed questions of law and fact, *de novo*." *Rizzo v. Smith*, 528 F.3d 501, 505 (7th Cir.2008). In doing so, we, like the district court, must evaluate the decision of the last state court to have adjudicated Corcoran's claim on the merits according to the standards set forth in 28 U.S.C. § 2254(d). *Williams v. Bartow*, 481 F.3d 492, 497-98 (7th Cir.2007). We will not grant a writ of habeas corpus unless the state court decision (1) was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "was

based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d); *Johnson v. Loftus*, 518 F.3d 453, 456 (7th Cir.2008) (citing *Williams v. Taylor*, 529 U.S. 362, 376, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

In determining whether the district court was correct in granting Corcoran's habeas petition, we must first identify the "clearly established Federal law" that Corcoran argues was offended by the Indiana state court decision. *Searcy v. Jaimet*, 332 F.3d 1081, 1087 (7th Cir.2003). We then determine "whether the state court's decision was either 'contrary to' or 'involved an unreasonable application of' those legal principles." *Id.* at 1088. A decision is "contrary to" federal law when the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the state court decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (quotations omitted); *Calloway v. Montgomery*, 512 F.3d 940, 943 (7th Cir.2008). An "unreasonable application" of clearly established federal law in the habeas context is more than an "incorrect" application. *Woods v. McBride*, 430 F.3d 813, 817 (7th Cir.2005) ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.") (citing *Williams*, 529 U.S. at 411, 120 S.Ct. 1495, 146 L.Ed.2d 389). "Rather, in order to trigger grant of

the writ, the state court decision must be both incorrect and unreasonable." *Id.* at 817; *see also Johnson*, 518 F.3d at 456 (noting that the Supreme Court has "recently reemphasized that a state court's application of clearly established law is acceptable, even if it is likely incorrect, so long as it is reasonable") (citing *Wright v. Van Patten*, --- U.S. ---, 128 S.Ct. 743, 169 L.Ed.2d 583 (2008)). In assessing the reasonableness of the Indiana Supreme Court's decision, we presume that its factual determinations are correct, unless clear and convincing evidence to the contrary rebuts them. 28 U.S.C. § 2254(e)(1); *Mack v. McCann*, 530 F.3d 523, 533 (7th Cir.2008).

A. Right to Jury Trial

We begin with Corcoran's contention that the State sought to "unconstitutionally chill or squelch the assertion of his right to a jury trial by penalizing Corcoran with a death sentence for exercising that right," which was contrary to or an unreasonable application of the "bright-line" rule in *Jackson*.

In *Jackson*, the Supreme Court construed a provision of the Federal Kidnapping Act, 18 § 1201(a), to allow for the imposition of the death penalty only upon the recommendation of a jury after a guilty verdict, whereas the maximum penalty for a defendant who pled guilty or waived a jury and was tried in a bench trial, was life imprisonment. The Court struck down the provision, finding that it reserved the possibility of the death penalty exclusively for defendants who insisted on a jury

trial and therefore imposed an impermissible burden on their right to a jury trial because it "chill[s] the assertion of constitutional rights by penalizing those who choose to exercise them." *Jackson*, 390 U.S. at 581, 88 S.Ct. 1209, 20 L.Ed.2d 138. The Court reasoned that the inevitable effect of the provision would be to discourage the assertion of the Fifth Amendment right not to plead guilty and to deter the exercise of the Sixth Amendment right to a jury trial. "[T]he evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them." *Id.* at 583, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138.

In the wake of *Jackson*, the Supreme Court has consistently held that *Jackson* does not stand for the proposition "that the Constitution forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *See e.g., Chaffin v. Stynchcombe*, 412 U.S. 17, 29, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) (discussing cases). In *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), a petitioner pleaded guilty and was sentenced to 50 years' imprisonment after being indicted under the Federal Kidnapping Act (the same statute at issue in *Jackson*). The petitioner argued that his guilty plea was involuntary, and therefore invalid under *Jackson*, since, according to the petitioner, every guilty plea entered under the Act before *Jackson* was invalidated by *Jackson*. The Court concluded that the petitioner "read far too much into the *Jackson* opinion ... *Jackson* prohibits the imposition of the death penalty under § 1201(a),

but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test ... that guilty pleas are valid if both 'voluntary' and 'intelligent.'" *Brady*, 397 U.S. at 746-47, 90 S.Ct. 1463, 25 L.Ed.2d 747; *see also North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) ("*Jackson* established no new test for determining the validity of guilty pleas.").

The Supreme Court continued to reaffirm "the permissibility of plea bargaining even though 'every such circumstance has a discouraging effect on the defendant's assertion of his trial right,' because the imposition of these difficult choices [is the] inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Corbitt v. New Jersey*, 439 U.S. 212, 219 n. 9, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) (quoting *Chaffin*, 412 U.S. at 31, 93 S.Ct. 1977, 36 L.Ed.2d 714). In *Bordenkircher v. Hayes*, the prosecutor offered to forego a habitual criminal count if the defendant pleaded guilty, in which event the mandatory life sentence would have been avoided. The defendant refused the offer, went to trial on an indictment that included a count requiring mandatory life imprisonment, and a jury found him guilty. The Court upheld the conviction, holding that the State's offer did not violate due process because it had "no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution," and emphasizing that "[t]o punish a person because he has done what the law plainly allows him to do is a

due process violation of the most basic sort, [and] for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Id.* at 365, 368, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604. But "in the give and- take of plea bargaining, there is no such element of punishment or retaliation as long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363, 365, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (internal citations omitted).

"[B]y tolerating and encouraging the negotiation of pleas, [the Supreme] Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." *Id.* at 364, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604. Under *Bordenkircher* and its progeny, "the Supreme Court has applied a presumption of vindictiveness 'exclusively in the *post-trial* context,' and has specifically considered and rejected claims that a presumption is applicable when, following failed [*pre-trial*] plea negotiations, additional charges are brought against a defendant." *Williams,* 481 F.3d at 504 (analyzing *Bordenkircher*) (emphasis added) (internal citation omitted); *see also United States v. Warda,* 285 F.3d 573, 580 (7th Cir.2002) ("The classic instance triggering the presumption [of vindictiveness] is the one in which the same judge tries and sentences a person for a second time after

he has succeeded in having his original conviction reversed.").[4]

Corcoran's attempt to equate the offer to waive his right to jury trial *during pre-trial negotiations* to a defendant who chose to exercise a legal right (*in a post-trial setting*) to attack his original conviction is an unreasonable interpretation of *Bordenkircher,* and the district court erred in accepting it.

Consequently, we have found no authority from the Supreme Court that provides support for the district court's decision that *Jackson* clearly established a rule that stands for the proposition that during pretrial negotiations, a prosecutor cannot offer to forgo the death penalty in exchange for a bench trial.[5] The Court has squarely held that a State may

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4 Corcoran does not argue that the State was vindictive in its decision to seek the death penalty.

5 We also note that the condemned provision of the Federal Kidnapping Act in *Jackson* provided in effect that a defendant could not be sentenced to death if he pled guilty, but faced a significant likelihood of capital punishment if he went to trial. However, the Indiana Death Penalty statute, which applies to Corcoran's state law murder convictions, permits a defendant to be sentenced to death, whether he pleads guilty, proceeds by bench trial, or proceeds by jury trial. See Ind.Code. § 35-50-2-9 (a)-(d); *Smith v. State,* 686 N.E.2d 1264, 1271 (Ind.1997).

encourage a guilty plea by offering substantial benefits in return for the plea, including an offer to forego seeking the death penalty. *See Corbitt,* 439 U.S. at 218, 99 S.Ct. 492, 58 L.Ed.2d 466. By making the second offer, the prosecutor merely tried to induce Corcoran to give up a right by agreeing to lenient treatment for Corcoran. Because it is clearly established law that a prosecutor may offer a "recommendation of a lenient sentence or a reduction of charges" as part of the plea bargaining process, we believe the Indiana Supreme Court correctly analyzed Corcoran's claim in the context of plea-bargaining under *Bordenkircher.*

As for the district court's conclusions that the State's second offer could not be considered a plea bargain since Corcoran was asked not for an admission of guilt, but rather to waive his right to a jury trial, these contentions have no basis for support in *Jackson* or elsewhere. First, the Supreme Court has upheld pleas that do not include an admission of guilt, commonly referred to as " *Alford* pleas." *See generally Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162. Further, while we believe that the State's second offer to forego the death penalty if Corcoran tried his case to the bench may be uncommon, the Supreme Court has long instructed that plea agreements may waive constitutional or statutory rights, most pertinently the right to a jury trial. *Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *see New York v. Hill,* 528 U.S. 110, 117, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000) ("We allow waiver of numerous constitutional protections for criminal defendants that also serve

broader social interests."); *Godinez v. Moran,* 509 U.S. 389, 397 n. 7, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) ("A criminal defendant waives three constitutional rights when he pleads guilty: the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers.") (citing *Boykin,* 395 U.S. at 243, 89 S.Ct. 1709, 23 L.Ed.2d 274). A criminal defendant may waive these fundamental protections afforded by the Constitution, so long as that waiver is made "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." *United States v. Ruiz,* 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002) (citing *Brady,* 397 U.S. at 748, 90 S.Ct. 1463, 25 L.Ed.2d 747); *Corbitt,* 439 U.S. at 218-19, n. 9, 99 S.Ct. 492, 58 L.Ed.2d 466 (footnote omitted) (emphasizing that " *Jackson* had in no way altered the test of *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) that guilty pleas are valid if knowing, voluntary, and intelligent."). A defendant may waive many other fundamental protections along with the right to a jury trial, in the context of plea negotiations, such as: the right to view impeachment information relating to any informants or other witnesses, *see Ruiz,* 536 U.S. at 629, 122 S.Ct. 2450, 153 L.Ed.2d 586, and *United States v. Nobles,* 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975); the right to an indictment, a trial, and an appeal (also known as a "fast-track" plea bargain), *see Ruiz,* 536 U.S. at 629, 122 S.Ct. 2450, 153 L.Ed.2d 586; the right to prevent the admission of statements during plea negotiations under Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6),

see United States v. Mezzanatto, 513 U.S. 196, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995); the right to collaterally attack a sentence, *see United States v. Broce,* 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989); the right to a double jeopardy defense, *Ricketts v. Adamson,* 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987); the right to counsel, *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); and the right to appeal, *see United States v. Hare,* 269 F.3d 859, 861 (7th Cir.2001).

During the pre-trial negotiations, the State *and* Corcoran's counsel attempted to convince Corcoran to plead guilty, or in the very least, proceed by bench trial, due to the overwhelming evidence against him. If it is constitutionally permissible to use the threat of more severe punishment to encourage a guilty plea, where a defendant gives up most of his rights, it should follow that the State's use of the same tactics to encourage a defendant to proceed by bench trial would also be constitutionally permissible, where he would have an opportunity to present evidence and cross-examine witnesses rights that would not otherwise be able to assert had Corcoran pleaded guilty. At the very least, *Jackson* does not render an offer like this impermissible or unconstitutional. Obviously, a jury trial is more burdensome than a bench trial for the State. But even in a bench trial, the State must present its full case against the defendant, and in turn, the defendant is entitled to offer a full defense. *United States v. Goodwin,* 457 U.S. 368, 383, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982) ("A prosecutor has no 'personal stake' in a bench trial and thus no reason to engage

in 'self-vindication' upon a defendant's request for a jury trial.").

"Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of making an intelligent choice in" accepting or rejecting the offer. *Bordenkircher,* 434 U.S. at 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (citing *Brady,* 397 U.S. at 758, 90 S.Ct. 1463, 25 L.Ed.2d 747). Indeed, counsel for Corcoran spent several hundred hours discussing his plea options, and acknowledged the overwhelming evidence against Corcoran and the generous nature of the State's offers in light of the evidence. Defense counsel even brought in other attorneys to speak with Corcoran to discuss the offers, and how, even though the offer to forego death in exchange for a bench trial had "never been heard of," it still gave Corcoran the option of presenting arguments and evidence to the court. A party in a criminal proceeding who does not like the terms of an offered plea bargain can refuse to accept them it "by spurning the offer and going to trial." *Hare,* 269 F.3d at 862. Corcoran took this route, which involved risking a death sentence should he lose at trial.

Given the amount of evidence compiled against Corcoran that he was responsible for the murders, including his own videotaped confession and the lack of defense that his counsel had available at trial, the State did not needlessly punish (under *Jackson*) Corcoran's right to a jury trial by making an offer to forego asking for death if he chose a bench trial. "A prosecutor should remain free before trial to exercise

the broad discretion entrusted to him to determine the extent of societal interest in prosecution." *Goodwin,* 457 U.S. at 382, 102 S.Ct. 2485, 73 L.Ed.2d 74. The Indiana Supreme Court's conclusion that the State's offer did not violate Corcoran's constitutional rights does not "l[ie] well outside the boundaries of permissible differences of opinion." *See Ward v. Sternes,* 334 F.3d 696, 703 (7th Cir.2003). The decision was neither incorrect nor unreasonable to warrant the district court's grant of Corcoran habeas petition.

B. Competency to Waive Post-Conviction Review

Corcoran cross appeals the district court's holding that Corcoran was competent to waive his post-conviction proceedings. Corcoran argues that the Indiana Supreme Court's conclusion that Corcoran was competent to waive post-conviction review was unreasonable and made despite clear evidence to the contrary. As we noted above, a federal court may set aside a state court's "decision that was based on an unreasonable determination of the facts in light of the evidence presented," and a federal court may not overturn a state court's factual determinations unless it concludes that they are not "fairly supported by the record." § 2254(d)(2), (8); *Demosthenes v. Baal,* 495 U.S. 731, 735, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990) (per curiam). The Supreme Court has held that a state court's conclusion regarding a defendant's competency is entitled to such a presumption. *Demosthenes,* 495 U.S. at 735, 110 S.Ct. 2223, 109 L.Ed.2d 762.

The petitioner has a "tougher row to hoe" when challenging his competence in post-conviction proceedings than when he is challenging his competence to stand trial. *Holmes v. Buss,* 506 F.3d 576, 579 (7th Cir.2007). Under *Rees v. Peyton,* 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966), when determining a petitioner's mental competence to forego judicial proceedings, a court must ask "whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation," or "whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." 384 U.S. at 314, 86 S.Ct. 1505, 16 L.Ed.2d 583; *Wilson v. Lane,* 870 F.2d 1250, 1254 (7th Cir.1989); *see also Holmes v. Buss,* 506 F.3d 576, 579 (7th Cir.2007) ("If ... the question is whether a petitioner for habeas corpus who has been sentenced to death is competent to withdraw a petition for certiorari filed on his behalf challenging the denial of habeas corpus, ... the answer is unlikely to require that he understand more than that the withdrawal of his petition will almost certainly terminate any legal challenge to his death sentence.") (internal citations omitted).

Corcoran believes the record clearly established that his decision to waive his rights was not based on "rational thinking" as discussed in *Rees.* He argues that three medical experts testified that he suffered from a mental illness and that his decision to waive any further appeal of his sentence was the product of the delusions and pain he was experiencing as a

result of his illness. Corcoran also contends that the Indiana Supreme Court erred in finding that he was aware of his legal position and the consequences of his waiver.

The Indiana Supreme Court gave careful consideration of all the evidence presented at the post-conviction hearing. The court acknowledged that the experts testified that Corcoran suffered from paranoid schizophrenia and his resulting delusions caused him to waive further review of his sentence, but the court also found that Corcoran had a clear awareness of the status of his case and what was at risk if he waived further review. The court took into account Corcoran's own conduct and testimony at the hearing, in which he stated that his decision to waive further proceedings was based on his remorse for his crime, and not on any "delusions" he was said to have been experiencing. Although the experts believed otherwise, the Indiana Supreme Court was entitled to accept Corcoran's contention that his request to waive further proceedings was based on his belief that death is a just punishment for his crimes. *See United States v. Collins*, 949 F.2d 921, 926 (7th Cir.1991) (finding that statements of the defendant are appropriate evidence for the court to consider when evaluating competency). The Indiana Supreme Court has recognized that "[w]hile most people consider death the ultimate penalty, some murderers faced with life imprisonment may rationally disagree." *Smith v. State*, 686 N.E.2d 1264, 1273 (Ind.1997) (considering a defendant's preference for death over life imprisonment, where there was an indication of his desire not to spend the

rest of his life in prison and noting that to do so is not "per se irrational"); *see also Wilson v. Lane,* 870 F.2d 1250, 1254 (7th Cir.1989) (in affirming a district court's finding of a death row inmate's competency to waive further appeals even though the inmate was ruled mentally incompetent, the Court considered the inmate's unwavering testimony that he was aware of his position and of the federal review options available to him, and that he based his decision not on the conditions of his confinement, but on his belief that death was a better option than life in prison).

Further, under the *Rees* standard, there is no support for Corcoran's contention that a petitioner who has been diagnosed with a mental illness is not competent to waive post-trial proceedings. The question under *Rees* is whether a mental illness substantially affects the capacity to appreciate his options and make a rational choice among them. *See Whitmore v. Arkansas,* 495 U.S. 149, 166, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (citing *Rees,* 384 U.S. at 314, 86 S.Ct. 1505, 16 L.Ed.2d 583); *see also Dennis v. Budge,* 378 F.3d 880, 889-92 (9th Cir.2004) (rejecting the claim that under *Rees,* a prisoner on death row should not be allowed to waive his post-conviction remedies if there is any possibility that the decision is a product of a mental disease, disorder or defect); *Smith v. Armontrout,* 812 F.2d 1050, 1057 (8th Cir.1987) ("It is very probable that in every case where a death-row inmate elects to abandon further legal proceedings, there will be a possibility that the decision is the product of a mental disease, disorder, or defect ... [y]et *Rees*

clearly contemplates that competent waivers are possible.").

Our review of the transcripts and the evidence before the Indiana Supreme Court reveals that it (as well as the two other courts that considered Corcoran's competency) thoroughly and conscientiously examined Corcoran's claims of incompetency, and its findings that he had a "rational understanding of and [could] appreciate his legal position" are factually supported by the record. Therefore, because the Indiana Supreme Court's decision was based on a reasonable determination of the facts in light of the evidence, we defer to the determination of the Indiana Supreme Court that Corcoran was competent.

III. CONCLUSION

The district court's finding that Corcoran was competent to waive his post-conviction proceedings is AFFIRMED. However, the decision of the district court to grant Joseph Corcoran habeas relief is REVERSED and REMANDED with instructions to deny the writ, and the State of Indiana is at liberty to reinstate the death penalty.

WILLIAMS, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority regarding Corcoran's Sixth Amendment claim, and I join that part of the opinion. However, I disagree with my colleagues' conclusion that Corcoran was competent to waive post-conviction review.

No one contests that Corcoran suffers from a mental illness. This is clear from his delusion that prison guards torture him daily with an ultrasound machine, his conversations with individuals who are not there, and his delusion that he suffers from an involuntary speech disorder. The question now is whether the Indiana state court was reasonable in finding that despite his illness, Corcoran was able to make a rational choice with respect to waiving any further appeal of his death sentence. *See Ward v. Sternes*, 334 F.3d 696, 703 (7th Cir.2003). The Indiana Supreme Court determined he was able to make a rational choice-one not driven by a desire to escape his delusions-based on three reasons. Because two of those reasons are directly contradicted by the record, however, I believe the Indiana court's decision finding waiver under these circumstances was unreasonable error.

Under 28 U.S.C. § 2254(d), the court can grant a writ of habeas corpus only where state court adjudication: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

Supreme Court"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See also Williams v. Taylor*, 529 U.S. 362, 376, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Corcoran must offer clear and convincing evidence to rebut the presumption that the Indiana Supreme Court's competency finding was correct. § 2254(e)(1).

The Indiana Supreme Court correctly identified *Rees* as the governing standard. *Rees v. Peyton*, 384 U.S. 312, 314, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966) (per curiam). In *Rees*, the Supreme Court articulated the following legal standard to be applied when a death row inmate seeks to forego further proceedings: "whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.* Although the Indiana Supreme Court used the correct standard, it made an unreasonable determination of the facts in light of the evidence presented.

The three experts who testified in the competency hearing unanimously concluded that Corcoran suffers from paranoid schizophrenia that renders waiver of further appeal of his death sentence impossible because the illness prevents him from making rational decisions. *Corcoran v. State*, 820 N.E.2d 655, 660, *aff'd on reh'g*, 827 N.E.2d 542 (Ind.2005) (*Corcoran III.*) All three experts interviewed Corcoran for several hours, reviewed his

medical and prison records, his pre-sentencing memorandum, numerous prior mental health evaluations, and correspondence between Corcoran and his sister. Additionally, one of the experts conducted interactive and written tests. They all agreed that Corcoran was not capable of making a rational waiver decision because he suffered from paranoid delusions and those served as the basis of his decision to waive post-conviction relief. The doctors explained that Corcoran suffered from the delusion that prison guards tortured him with sound waves causing his body to twitch and the delusion that he suffered from an involuntary speech disorder. *See* Competency Hr'g Tr. 12, Oct. 21, 2003.

Despite this evidence, the Indiana court concluded that Corcoran had the capacity to make a rational choice on the following grounds:

> Corcoran ... made no statement to any of the experts evaluating him indicating that he wished to end his appeals in order to escape his paranoid delusions. Corcoran's prison medical records and the testimony of each expert indicated that his psychotic symptoms were being controlled through various psychiatric medications. Corcoran himself spoke directly to his reasons for not pursuing post-conviction review and the contention that his delusions were prompting his actions at the post-conviction hearing.

Corcoran III, 820 N.E.2d at 660 (footnote omitted).

The problem with the conclusion that Corcoran had the capacity to make a rational choice is that two of the court's three reasons are directly contradicted by the evidence presented. *See Mendiola v. Schomig*, 224 F.3d 589, 592 (7th Cir.2000) ("If a state court's finding rests on thin air, the petitioner will have little difficulty satisfying the standards for relief under § 2254."). First, the court reasoned Corcoran never told any of the experts that he wanted to die to escape his delusions. That is not true. Second, the court stated that each expert indicated Corcoran's medication controlled his psychotic symptoms. That also is not true. The court also relied on Corcoran's own testimony, but the court failed to consider Corcoran's testimony in light of his delusions.

The court's first reason for finding Corcoran capable of making a rational choice was that Corcoran never told any expert that he wanted to die to escape his delusions. This statement was wrong, however, because Corcoran *did* tell Dr. Kaplan that he wanted to die in order to escape the delusions, some of which he said caused him pain.[1] Dr. Kaplan explicitly

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1 I also note that Dr. Haskins testified that Corcoran wanted to bring about his own death "[i]n order to escape from his supposed ... persecution and the control of the guards and his discomfort over this delusion about speaking involuntarily." Competency Hr'g Tr. 68. It is not clear from Dr. Haskins's testimony whether he learned of these reasons only through Corcoran's correspondence or through his interview with Corcoran or a combination of both. But even with Dr. Haskins's testimony aside,

testified that during his meeting with Corcoran, Corcoran told him he wanted to be put to death because "he wanted to be released from the quote, unquote, pain and suffering of his involuntary speech disorder which really doesn't exist." Competency Hr'g Tr. 19. The experts all agree that Corcoran does not suffer from a speech disorder, but that his delusion causes him to believe he does. *Id.* at 62.

Second, the record directly contradicts the court's finding that each expert indicated that Corcoran's medication controlled his psychotic symptoms. Dr. Kaplan explicitly testified that Corcoran's medication did not have a significant effect on controlling his paranoia and delusions. *Id.* at 34. Moreover, Dr. Kaplan was the only one of the three experts who was asked to testify about the effects of Corcoran's medication. When he did, Dr. Kaplan acknowledged that Corcoran benefitted from taking his antipsychotic medications, but stated that even when medicated "it didn't appear that at any time he was not paranoid or not delusional." *Id.* at 34. Dr. Kaplan further testified that medical records revealed that even after Corcoran took a "very high dose" of an antipsychotic medication in prison he continued to suffer from paranoia and auditory hallucinations. *Id.* at 24. I also note that the post-conviction trial court had made the same incorrect finding that testimony at the hearing showed that Corcoran's medication controlled his symptoms. This

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Corcoran clearly told Dr. Kaplan he wished to die to escape his involuntary speech disorder.

is significant because the Indiana Supreme Court gave a high level of deference to the trial court's conclusion. *Corcoran III*, 820 N.E.2d at 660.

The Indiana Supreme Court unreasonably concluded that Corcoran had the ability to make a rational choice based on these two erroneous factual premises. "[E]ven a partial reliance on an erroneous fact finding can support a finding of unreasonableness." *Ben-Yisrayl v. Buss*, 540 F.3d 542, 550 (7th Cir.2008) (discussing *Wiggins v. Smith*, 539 U.S. 510, 528, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)); *see also Mendiola*, 224 F.3d at 592-93 (state court's finding should be supported by the record). This leaves only the third reason provided by the court-Corcoran's own testimony.

The Indiana Supreme Court stated that based on Corcoran's testimony at the competency hearing, it was clear that Corcoran understood the nature of the proceedings, the responsibilities of counsel, and the nature of the appellate procedure. *Corcoran III*, 820 N.E.2d at 661. The court relied very heavily on Corcoran's statement that, "I want to waive my appeals because I am guilty of murder. I think that I should be executed for what I have done and not because I am supposedly tortured with ultrasound or whatever ... I believe the death penalty is a just punishment for four counts of murder," as an indication that Corcoran could appreciate his position and make a rational choice. *Id.* at 660-61.

The majority reasons that the Indiana Supreme Court was entitled to believe Corcoran's contention

that he wished to waive further proceedings because of his guilt, and I agree that ordinarily, the Indiana court's decision to rely on one person's testimony over other people's testimony would be one to which we would defer. *See Herrera v. Collins,* 506 U.S. 390, 400-01, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) ("upon habeas corpus the court will not weigh the evidence") (citation omitted). But this is not a case where the court picked the opinion of one expert who believed Corcoran could make a rational decision over an expert who disagreed. Indeed, the State presented no expert who contradicted the conclusions of these three experts. Rather, the person whom the court credited was a person diagnosed with a severe mental illness that causes delusions, who told a doctor and his sister he wanted to die to escape those delusions. The medical experts who evaluated Corcoran testified he purposely downplays his illness and is intelligent enough to know how to hide his psychosis. In fact, Dr. Parker stated that Corcoran "would rather be executed than admit that schizophrenia might be contributing to his desire to die." Those experts all testified that Corcoran's illness has a direct bearing on his thought process and renders him incapable of making a rational choice. The Indiana Supreme Court acknowledged the experts' testimony regarding Corcoran's delusions but it did not discuss his decision to waive post-conviction review in light of his delusions.[2]

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2 Corcoran's own words later in the competency hearing further belie the conclusion that he understood and rationally made the choice to waive

But even if the Indiana Supreme Court could have relied on its own judgment over the opinions of the experts in this case, the factual inaccuracies of the court's two other reasons render its entire finding infirm. *See, e.g., Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) ("A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude that the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.").

The court determined that medication controlled Corcoran's delusions and that the only reason Corcoran himself had ever given for wanting to waive further proceedings was his guilt. This might be a different case if those determinations were true. Because both determinations are directly contradicted by the record, however, I believe the Indiana Supreme Court's finding is not "fairly supported by the record"; instead, the record clearly contradicts it. *Cf. Demosthenes v. Baal*, 495 U.S. 731, 735, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990) (per

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post-conviction relief. At the close of the hearing, Corcoran asked the judge what would happen if he found Corcoran incompetent. The judge explained that the court would then proceed on the post-conviction petition filed by his attorneys. If Corcoran understood his position and possessed the ability to make a rational choice among his options, it would seem he would have understood the proceedings that had just taken place.

curiam) (upholding state court finding that inmate was competent to waive his right to pursue post-conviction relief where three psychiatrists determined he was competent). "The [habeas] standard is demanding but not insatiable ... [d]eference does not by definition preclude relief." *Miller-El v. Dretke,* 545 U.S. 231, 240, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (citation omitted).

For this reason, I would reverse the district court's finding that Corcoran was competent to waive his post-conviction proceedings and grant Corcoran a conditional writ of habeas corpus requiring litigation of Corcoran's post-conviction petition in state court. I respectfully dissent.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

JOSEPH EDWARD CORCORAN, Petitioner,	)
v.	)
ED BUSS, Respondent.	)

CAUSE NO. 3:05-CV-389 AS
DEATH PENALTY CASE

OPINION AND ORDER

This proceeding is a habeas corpus petition filed by counsel on behalf of the petitioner, Joseph Edward Corcoran, seeking relief under 28 U.S.C. § 2254 from a state court criminal proceeding in which he was sentenced to death. Oral argument was held on the petition in Lafayette, Indiana on March 19, 2007. This court greatly appreciates the work of all counsel in this difficult matter, but specifically notes the able services rendered by appointed counsel for Mr. Corcoran.

I. FACTUAL AND PROCEDURAL BACKGROUND

The procedural history of this case is unusual and more convoluted than normal so it is particularly important to lay it out fully here. There are five

published opinions of the Supreme Court of Indiana related to this case.

Corcoran v. State, 739 N.E. 2d 649 (Ind. 2000)

Corcoran v. State, 774 N.E. 2d 495 (Ind. 2002)

Corcoran v. State, 820 N.E. 2d 655 (Ind. 2005)

Corcoran v. State, 827 N.E. 2d 542 (Ind. 2005)

Corcoran v. State, 845 N.E. 2d 1019 (Ind. 2006)

Each will be discussed later in this opinion as necessary. The state record has been filed and examined here pursuant to the mandates of *Townsend v. Sain*, 372 U.S. 293 (1963), as well as 28 U.S.C. § 2254.

> Joseph E. Corcoran was under stress because his sister's upcoming marriage would necessitate his moving out of her house. And his brother said Corcoran could not move in with him.
> He awoke one afternoon to hear his brother and others downstairs talking about him. Irritated, he loaded his rifle and went downstairs to intimidate them, but as Corcoran said later, "It just didn't happen that way." (R. at 1988.) Corcoran killed his brother, his sister's fiancé, and two other men in the ensuing incident.

Corcoran v. State, 774 N.E.2d 495, 497 (Ind. 2002).

> On July 26, 1997, Corcoran was lying on his bedroom floor and heard men's voices. He

> became upset because he thought the men were talking about him and took a semi-automatic rifle downstairs to confront them. In the living room were four men, including Corcoran's brother and future brother-in-law, both of whom lived in the house with Corcoran.
>
> Corcoran shot and killed Jim Corcoran, Scott Turner and Timothy Bricker at close range. The final victim, Doug Stillwell, tried to escape, but Corcoran chased him into the kitchen and shot him in the head.

Corcoran v. State, 774 N.E.2d 495, 501 (Ind. 2002)

On July 31, 1997, Mr. Corcoran was charged with four counts of murder. Trial Record at 29-36. Nine and a half months later, on May 11, 1998, the state withdrew from negotiations with the defendant. Trial Record at 151. Two days later, on May 13, 1998, the state filed four applications for the death penalty. Trial Record at 111-118. On May 10, 1999, the state filed four amended applications for the death penalty which were granted on May 13, 1999. Trial Record at 369-377. Jury Selection began on May 17, 1999. Trial Record 664. The selected jury was sworn on May 19, 1999. Trial Record at 1605-06. The trial, under cause number 02D04-9707-CF-465 began on May 20, 1999. Trial Record at 1609. The jury went out at 10:40 A.M. on May 22, 1999. Trial Record at 2207. Less than an hour later, Mr. Corcoran was found guilty on all four counts of murder. Trial Record at 460-63, 2209-10, and 2214. The penalty phase began on May 24, 1999. Trial Record at 2215. The jury went out at 9:30 a.m. on

May 25, 1999. Trial Record at 2522. Less than two hours later, the jury recommended the death penalty on all four counts. Trial Record at 556-59, 2525-29, and 2533. On August 26, 1999, the judge imposed the death sentence. Trial Record at 2573-78.

On direct appeal, Mr. Corcoran sought review of only his death sentence. By counsel, he explicitly waived an appeal of the findings of guilt. Appendix to Appellant's Brief, file marked March 30, 2004, at 205. In his affidavit, he stated,

> [A]t this time I confirm my position that I do wish to waive my appeal of the underlying murder convictions in this case . . . I am requesting a review of my sentencing in this case . . . I understand that a waiver of my murder convictions is a final decision and is irreversible . . ..

Appendix to Appellant's Brief, file marked March 30, 2004, at 206. His appellate brief closed by asking, "that the death penalty in this case should be set aside and requests the Court to do so."

Docket # 32-3 at 69. The Supreme Court of Indiana recognized that Mr. Corcoran did not seek review nor reversal of his convictions.

> Appealing from the trial court judgment, the defendant does not challenge the guilt phase proceedings or his resulting convictions. His appellate claims concern only the penalty and sentencing proceedings and his death sentence.

Corcoran v. State, 739 N.E. 2d 649, 651 (Ind. 2000).

On December 6, 2000, a unanimous Indiana Supreme Court vacated the death sentences and remanded the case for re-sentencing. *Corcoran v. State*, 739 N.E. 2d 649 (Ind. 2000). Justice Dickson wrote the opinion and was joined by three other justices; Chief Justice Shepard concurred in the decision with a separate opinion.

> From the combination of the trial court's remarks in open court that she was "convinced in her heart of hearts" that the defendant, "if given the opportunity, would murder again," Record at 2916, and of the court's written references in the sentencing statement to the innocence of the victims and the heinousness of the murders, we find a significant possibility that the trial court may have relied upon non-statutory aggravating factors in deciding whether to impose the death penalty. We therefore remand this cause to the trial court to redetermine from the evidence already presented whether to impose the death sentence, life without parole, or a term of years, based only upon mitigating and proper aggravating circumstances, and to issue a new sentencing statement.

Corcoran v. State, 739 N.E.2d 649, 657 (Ind. 2000).

On September 30, 2001, Mr. Corcoran was re-sentenced to death. Supplemental Record at 46-50. Again the case returned to the Indiana Supreme Court which affirmed on September 5, 2002.

Corcoran v. State, 774 N.E. 2d 495 (Ind. 2002). Chief Justice Shepard wrote the opinion and was joined by three other justices; Justice Rucker dissented with a written opinion. He began by stating "I respectfully dissent because I do not believe a sentence of death is appropriate for a person suffering a severe mental illness." *Corcoran v. State*, 774 N.E. 2d 495, 502 (Ind. 2002) (Rucker J., dissenting). The petition for rehearing was denied in an unpublished opinion on March 4, 2003. Docket # 1-4.

On May 8, 2003, the trial court submitted a proposed case management schedule to the Supreme Court of Indiana. Docket # 32-14 at 3. On May 30, 2003, the Supreme Court of Indiana approved the proposed case management schedule and set the date for filing a petition for post-conviction relief for September 9, 2003. Docket # 32-14 at 4. On August 27, 2003, post-conviction counsel filed a motion seeking to extend that deadline stating,

> Due to our client's mental illness outlined in the Notice of Intent filed on April 2, 2003, counsel's ability to 'confer with petitioner and ascertain all grounds for relief' pursuant to Ind. Post-Conviction Rule 1(9)(c) and to fulfill our duty to investigate the case pursuant to ABA Standards for Criminal Justice Prosecution Function and Defense Function 4-4.1 has been severely inhibited. This obstacle makes it extremely difficult for counsel to file an initial Petition for Post-Conviction Relief by September 9, 2003.

Appendix to Appellant's Brief, file marked March 30, 2004, at 55-56. That motion was denied by the post-conviction court on August 29, 2003. Appendix to Appellant's Brief, file marked March 30, 2004, at 58.

On September 9, 2003, the last day before the deadline expired, post-conviction counsel filed an unverified Petition for Post-Conviction Relief. Appendix to Appellant's Brief , file marked March 30, 2004, at 88-136 and also 142-190. At the same time, counsel also filed a motion to determine competency, stating, "Joseph E. Corcoran did not sign his Petition for Post-Conviction Relief . . .." Appendix to Appellant's Brief, file marked March 30, 2004, at 59. On September 30, 2003, the post-conviction court struck the post-conviction relief petition.

> Pursuant to the Supreme Court's Order of May 30, 2003, approving the Trial Court's Case Management Schedule, the defendant was to file his Petition for Post- Conviction Relief on or before September 9, 2003.
> On September 9, 2003, counsel for the defendant filed, by certified mail, documents entitled "Petition for Post-Conviction Relief" and "Verified Motion to Determine Competency." The document entitled "Petition for Post-Conviction Relief is neither signed by the defendant, nor verified to contain all grounds known to defendant for vacating, setting aside, or correcting the conviction and sentence.
> Pursuant to long standing case law, [the most recent being *White v. State*, 793 N.E. 2d 1127

> (Ind. App. 2003)] and the rules governing post-conviction relief requiring signature by the defendant and verification, the Court orders the Petition returned to counsel, stricken from the record and notifies the Supreme Court by this Order of the defendant's failure to comply with the Trial Court's Case Management Schedule, and his failure to comply with the Rules for Post-Conviction Relief.
>
> The pleading entitled "Verified Motion to Determine Competency" has been set for hearing October 21, 2003 at 1:30 p.m. Defense counsel have cited no Indiana law in their brief, relying on cases from the United States Supreme Court, 3rd, 5th, 7th, 8th, 9th, and 10th Circuit Court of Appeals and State cases from Oklahoma and Wisconsin. The State has filed no responsive pleading, and is ordered to do so by October 15, 2003.

Appendix to Appellant's Brief, file marked March 30, 2004, at 80 (brackets in original).

On October 21, 2003, the state post-conviction court held a hearing on the motion to determine competency. Mr. Corcoran testified under oath and said,

> See, I want to waive my appeals because I am guilty of murder. I think that I should be executed for what I have done and not because I am supposedly tortured with ultrasound or whatever. I am guilty of murder. I should be executed. That is all there is to it. That is what I

> believe. I believe the death penalty is a just punishment for four counts of murder, and I believe that I should be executed since I am guilty of four counts of murder.

Post-conviction transcript dated October 21, 2003 at 89. On December 19, 2003, the post-conviction court held a follow-up hearing and issued a written order finding Mr. Corcoran competent. In the written opinion, the court noted that, "The evidence is clear that the Defendant suffers from a mental illness." Appendix to Appellant's Brief, file marked March 30, 2004, at 247.

> The issue before this Court, however, is not whether the Defendant suffers from a mental illness, but rather whether he is competent to waive post-conviction review of his convictions and death sentence. The statutes governing comprehension to stand trial, and the case law interpreting those statutes indicate, if a Defendant understands the nature of the proceedings and is able to assist counsel in the preparation of his defense, then that Defendant is competent to stand trial. The trial Court's observations of the Defendant and the Defendant's own comments and statements may also be considered in a competency determination.
>
> . . .
>
> The dialogue the State and the Court had with the defendant clearly indicate he is competent and understands what he is doing. While his choice of action may be unwise, and obviously

> against the advice of counsel, he is competent to make this ultimate decision in spite of his mental illness.

Appendix to Appellant's Brief, file marked March 30, 2004, at 247-48. At the hearing, after finding that Mr. Corcoran was competent, the judge offered him an opportunity to sign the post-conviction relief petition and proceed. Mr. Corcoran stated, "I don't want to appeal." Post-conviction transcript dated December 19, 2003 at 10.

Thereafter, his attorneys appealed the determination of competency.

> On November 16, 2004, Corcoran filed a request with this Court, accompanied by an affidavit indicating his intention to pursue post-conviction relief after all, asking us to dismiss this appeal of the trial court's competency determination as moot and return this case to that court for post-conviction proceedings.

Corcoran v. State, 820 N.E. 2d 655, 658 (Ind. 2005). That request was denied. The Indiana Supreme Court affirmed the finding of competency. Justice Sullivan wrote the opinion and was joined by three other justices; Justice Rucker dissented with a lengthy opinion. He began by stating, "I respectfully dissent because I believe Corcoran is not competent to waive his right of post-conviction review." *Corcoran v. State*, 820 N.E. 2d 655, 665 (Ind. 2005) (Rucker J., dissenting). The petition for rehearing was denied in a published opinion on May 12, 2005.

Corcoran v. State, 827 N.E. 2d 542 (Ind. 2005). Justice Sullivan wrote the opinion and was joined by three other justices; Justice Rucker dissented with a brief opinion based on the reasons previously stated and because "it essentially forecloses any chance that Corcoran may obtain post-conviction review of his conviction and sentence." *Corcoran v. State*, 827 N.E.2d 542, 547 (Ind. 2005) (Rucker, J., dissenting).

On February 10, 2005, Corcoran filed a signed post-conviction relief petition. Appendix to Appellant's Brief, file marked September 27, 2005, at 315-62. The post-conviction court dismissed it as untimely.

> After a review of these pleadings, the Supreme Court's May 12, 2005 Opinion, the Supreme Court Order approving the trial court's case management schedule, the trial court finds the Petition for Post-Conviction Relief filed on February 10, 2005 is untimely. (Seventeen (17) months past the September 9, 2003 deadline.) Pursuant to the Supreme Court approved case management schedule, defendant was required to file a proper Petition for Post-Conviction relief on or before September 9, 2003. As defendant did not comply with this required deadline, the Petition filed February 10, 2005 is ordered dismissed as time-barred.

Appendix to Appellant's Brief, file marked September 27, 2005, at 390-91. Returning to the Supreme Court of Indiana, the court affirmed on April 18, 2006. Justice Sullivan again wrote the opinion and was joined by three other justices;

Justice Rucker dissented without a separate opinion. *Corcoran v. State*, 845 N.E. 2d 1019 (Ind. 2006).

II. TIMELINESS OF THIS HABEAS CORPUS PETITION

On June 27, 2005, counsel for Mr. Corcoran initiated these habeas corpus proceedings. The court feels compelled to note at this point that this habeas corpus petition is seriously untimely. Habeas Corpus petitions are subject to a one year statute of limitations.

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Here, the 1-year period of limitation ran from the date on which the judgment became final at the expiration of the time for seeking direct review pursuant to subparagraph A. There has been no argument presented to this court nor any factual basis in this record to indicate that the state prevented Mr. Corcoran from filing a application for a writ of habeas corpus anytime he so wanted. Though the confusion over Mr. Corcoran's post-conviction relief petitions may have been a distraction, they in no way obstructed him from filing a habeas corpus petition; therefore subparagraph B is not applicable. There is no argument here based on a newly recognized constitutional right made retroactively applicable to cases on collateral review; therefore subparagraph C is not applicable. Finally, there is no argument here based on newly discovered evidence; therefore subparagraph D is not applicable.

After conviction and sentencing, Mr. Corcoran took a direct appeal which resulted in remand for re-sentencing followed by a second direct appeal. The Supreme Court of Indiana affirmed; later it denied his petition for rehearing on March 4, 2003. The

United States Supreme court has noted favorably that, "The Courts of Appeals have uniformly interpreted 'direct review' in §2244(d)(1)(A) to encompass review of a state conviction by this Court." *Clay v. United States*, 537 U.S. 522, 528, n.3 (2003); *see also Lawrence v. Florida*, ___ U.S. ___, ___; 127 S. Ct. 1079, 1084 (2007). Therefore the time for seeking direct review of his conviction did not expire until the passage of the ninety days for filing a petition for certiorari. Allotting those ninety days, the 1-year period of limitation began to run on June 3, 2003.

28 U.S.C. § 2244(d)(2) provides for tolling during the time in which a "properly filed" State post-conviction petition is pending, but "[a] collateral attack that is untimely under state law is not 'properly filed.'" *Brooks v. Walls*, 279 F.3d 518, 521 (7th Cir. 2002). As the Supreme Court of Indiana made clear in several opinions, Mr. Corcoran did not ever have a properly filed post-conviction petition. *Corcoran v. State*, 820 N.E. 2d 655 (Ind. 2005); *Corcoran v. State*, 827 N.E. 2d 542 (Ind. 2005); and *Corcoran v. State*, 845 N.E. 2d 1019, 1024 (Ind. 2006) ("We affirm the post-conviction court's dismissal of Joseph Corcoran's February 10, 2005 petition for post-conviction relief. We hold that the February 10, 2005 petition does not relate back to the unverified September 9, 2003 petition as the latter was not timely filed.") Therefore nothing tolled the 1-year period of limitation and it expired on June 3, 2004.

Therein lies the problem. This habeas corpus proceeding was not initiated until more than a year

later on June 27, 2005. The Supreme Court has upheld the validity of the statute of limitations found in 28 U.S.C. § 2244(d), even where is cuts off all federal review of a death sentence. *See Lawrence v. Florida*, ___ U.S. ___, ___; 127 S. Ct. 1079, 1084 (2007). Nevertheless, the respondent did not raise this issue, nor mention in this proceeding whether the petition was timely. "A statute of limitations defense . . . is not 'jurisdictional,' hence courts are under no obligation to raise the time bar *sua sponte*." *Day v. McDonough*, 547 U.S. 198, ___; 126 S.Ct. 1675, 1681 (2006). Therefore, "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." *Day v. McDonough*, 547 U.S. 198, ___; 126 S.Ct. 1675, 1684 (2006).

In *Day*, the respondent erroneously calculated the time and the Supreme Court held that where "there was merely an inadvertent error, a miscalculation that was plain" *Day v. McDonough*, 547 U.S. 198, ___; 126 S.Ct. 1675, 1685 (2006), the court could, in its discretion and with procedural limitations, raise the 1-year period of limitation *sua sponte*. Nevertheless, where a state has intelligently chosen to waive this defense, a court is not "at liberty to disregard that choice." *Day v. McDonough*, 547 U.S. 198, ___; 126 S.Ct. 1675, 1685 (2006).

Here, the respondent has not miscalculated because there is no calculation nor even any mention as to timeliness in the respondent's brief. Nevertheless, it does not appear that the omission was inadvertent because during the inchoate state post-conviction

proceedings, the respondent, on May 25, 2005, included this footnote in a memorandum seeking the dismissal of the February 10, 2005 post-conviction relief petition.

> In addition to Corcoran's time-bar for post-conviction review, any federal habeas petition will similarly be time-barred under 28 U.S.C. § 2244(d). That statute of limitations requires any federal habeas petition to be filed within one year of the denial of certiorari review in the U.S. Supreme Court on direct appeal. While the proper filing of a state post-conviction petition tolls that limitations period during the time which the post-conviction petition is pending in state court, Corcoran allowed more than one-year to pass before filing a state post-conviction petition (even assuming that the instant petition was properly filed under the meaning of the federal statute), so any federal habeas petition is time-barred in its own right. *See e.g., Pace v. DiGuglielmo*, 544 U.S. [408], 125 S.Ct. 1807 (2005).

Appendix to Appellant's Brief, file marked September 27, 2005, at 388. This footnote clearly demonstrates that the respondent was aware that this habeas corpus petition was untimely. Therefore it appears that the respondent chose to waive this defense. However, because this issue was not addressed by counsel, it is at least theoretically possible that it was an inadvertent omission. Nevertheless, because the respondent had actual knowledge of the untimeliness of the petition, yet did

not raise this defense in the return, the court will not exercise any discretion that it might have to address this petition's untimeliness other than to note it for the record.

III. STANDARD OF REVIEW

Certainly as a generalized proposition, the facts found by the highest court of the State of Indiana are entitled to a rebuttable presumption of correctness under 28 U.S.C. § 2254(e)(1), and the burden is on the petitioner in that issue to otherwise show the same by clear and convincing evidence.

> AEDPA provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner.

Brown v. Payton, 544 U.S. 133, 141 (2005) (citations omitted).

> As we have explained, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied a [United States] Supreme Court case incorrectly. Rather it is the habeas applicant's burden to show that the state court applied [that case] to the facts of his case in an objectively unreasonable manner.

Price v. Vincent, 538 U.S. 634, 641 (2003) (quotation marks, citations and brackets omitted).

Thus, the United States Supreme Court has made clear that it is not for this court to decide the merits of the petitioner's arguments from scratch. Rather, the task laid out before this court in a § 2254 habeas corpus petition is to determine whether the decision of the state court, in this case the Supreme Court of Indiana, falls outside of that broad swath of reasonable interpretations of the law based solely on the holdings of United States Supreme Court opinions at the time of the state court decision.

Additionally, there is the question of procedural default where a petitioner has not properly raised a question before the state's highest court.

> Inherent in the habeas petitioner's obligation to exhaust his state court remedies before seeking relief in habeas corpus, *see* 28 U.S.C. § 2254(b)(1)(A), is the duty to fairly present his

federal claims to the state courts. *Baldwin v. Reese*, 541 U.S. 27 (2004); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999); *Picard v. Connor*, 404 U.S. 270, 275 (1971). "Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in the federal habeas proceeding does it make sense to speak of the exhaustion of state remedies." *Id.* at 276. Fair presentment in turn requires the petitioner to assert his federal claim through one complete round of state-court review, either on direct appeal of his conviction or in post-conviction proceedings. *Boerckel*, 526 U.S. at 845. This means that the petitioner must raise the issue at each and every level in the state court system, including levels at which review is discretionary rather than mandatory. *Ibid.*

A habeas petitioner who has exhausted his state court remedies without properly asserting his federal claim at each level of state court review has procedurally defaulted that claim. *See id.* at 848-49; *see also, e.g., Howard v. O'Sullivan*, 185 F.3d 721, 725 (7th Cir. 1999); *Momient-El v. DeTella*, 118 F.3d 535, 541 (7th Cir. 1997). A procedural default will bar federal habeas relief unless the petitioner can demonstrate both cause for and prejudice stemming from that default, *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977), or he can establish that the denial of relief will result in a miscarriage of justice, *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). Cause for a default is ordinarily established by showing that some type of external impediment prevented the petitioner from presenting his federal claim to

> the state courts. *Id.* at 488, 492. Prejudice is established by showing that the violation of the petitioner's federal rights "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original). In order to show, alternatively, that a miscarriage of justice would result if habeas relief is foreclosed, the petitioner must show that he is actually innocent of the offense for which he was convicted, *i.e.*, that no reasonable juror would have found him guilty of the crime but for the error(s) he attributes to the state court. *Schlup v. Delo*, 513 U.S. 298, 327-29 (1995).

Lewis v. Sternes, 390 F.3d 1019, 1025-1026 (7th Cir. 2004) (parallel citations omitted).

IV. GROUND 1 - SIXTH AMENDMENT JURY TRIAL RIGHT

The petitioner argues that, "Indiana unconstitutionally sought to chill or squelch the assertion of his constitutional right to a jury trial by penalizing Petitioner with a death sentence for exercising that right." Petition at 10, docket # 13. The respondent argues that, "the Indiana Supreme Court correctly recognized that the United States Supreme Court, in jurisprudence rendered approximately a decade in the wake of [*United States v.*] *Jackson*[, 390 U.S. 570 (1968)], unambiguously approved of a prosecutor's ability to offer leniency in plea negotiations." Return at 15,

docket # 33. The Supreme Court of Indiana addressed this argument in Corcoran's first direct appeal.

> The defendant contends that Indiana's death penalty scheme impermissibly infringes, facially and as applied, upon the right to jury trial. He argues that, because identical factors may support a prosecutor's decision to seek either death or life imprisonment, the statute enables prosecutors to seek the death penalty "to coerce an individual who refuses to plead guilty to relinquish a constitutional right" to jury trial. Brief of Appellant at 46. The defendant asserts that in his case he declined the State's offer to accept a guilty plea or try his case to the bench and thereby avoid the death penalty. He urges that because the prosecutor thus believed that life imprisonment was the appropriate penalty, the request for the death penalty had no basis except to provide "a strategic advantage . . . to force the defendant to abdicate a basic right." Brief of Appellant at 47.
>
> We disagree. Prosecutors are traditionally given wide discretionary power in our criminal justice system to select the persons to be prosecuted and to plea-bargain with them. The Supreme Court has recognized the benefits of efficiency and speedy dispositions that plea-bargaining offers, and has fully approved its use as long as it is accompanied by safeguards that insure full knowledge on the part of the defendant offering a guilty plea as to his rights, his consequent

waiver of those rights, the crime to which he is pleading guilty, and the maximum penalty or the extent to which he places himself at risk. *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). In the context of plea-bargaining, we do not see a material distinction in the discretionary powers of the prosecutor in offering to agree to a lesser sentence for a guilty plea or for a bench trial. Our case law, which proscribes the imposition of a harsher sentence because a defendant exercised his right to jury trial, is rightly focused on the actions of the judge as sentencer and not the prosecutor as charger. *See Hill v. State*, 499 N.E.2d 1103, 1107 (Ind. 1986) ("Whether the severity of a particular sentence was improperly influenced by a defendant's jury trial election requires an individualized consideration." *Id.* Factors to be considered are (1) the role the judge played in the plea negotiations; (2) whether the judge encouraged the defendant to plead guilty; (3) the presence of threats from the judge of a more severe sentence if convicted following a jury trial; and (4) any evidence that the trial judge penalized the defendant for going to trial. *Pauley v. State*, 668 N.E.2d 1212, 1213 (Ind. 1996); *Hill* [*v. State*], 499 N.E.2d [1103] at 1107 (Ind. 1986)).

The defendant did not waive his right to jury trial and fails to point to anything in the record that indicates he received a more severe sentence from the court because he exercised his right to jury trial. Absent a specific showing that

> a particular sentence was improperly influenced by the defendant's exercise of his right to jury trial, which is not presented here, we decline to reverse.

Corcoran v. State, 739 N.E.2d 649, 654 (Ind. 2000) (emphasis added).

It is of critical importance to note that the Supreme Court of Indiana recognized that the petitioner faced two distinct offers from the prosecutor prior to trial. First, he was offered the opportunity to plead guilty. In exchange the prosecutor would not seek the death penalty. Second, he was offered the opportunity to waive his right to a jury trial and proceed with a bench trial. In exchange the prosecutor would not seek the death penalty.

The first offer is common in our system of justice. It is widely accepted and the petitioner does not argue here that the offered plea bargain was unconstitutional. Clearly it was not. It is well within prosecutorial discretion to offer to waive the death penalty in exchange for a guilty plea. "The power of a court to accept a plea of guilty is traditional and fundamental. Its existence is necessary for the practical administration of the criminal law." *United States v. Jackson*, 390 U.S. 570, 584-85 (1968) (quotation mark and ellipsis omitted).

> Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Defendants advised by competent counsel and

> protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.
>
> While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable -- and permissible – attribute of any legitimate system which tolerates and encourages the negotiation of pleas. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

Bordenkircher v. Hayes, 434 U.S. 357, 363-364 (1978) (citations, quotation marks, and brackets omitted). Nothing in this opinion should be read to undermine or impugn the legitimacy of the process whereby a

prosecutor negotiates with a criminal defendant to obtain a guilty plea.

But a guilty plea was not the object of the second offer. That offer did not ask nor require the defendant to plead to anything, it only asked him to waive his right to a jury trial and proceed with the judge as the factfinder. Such an offer is not common. Indeed, the court has neither found nor been cited to any other case where a prosecutor sought to induce a defendant to waive only his right to a jury trial in exchange for avoiding the possibility of the death penalty, or anything else. Neither can such an offer be considered a plea bargain since no plea is involved. It was not a confession that was asked of the defendant, but rather only a waiver of his right to a trial by jury.

At first blush, the question arises, what harm is caused by such an offer? If a defendant can trade away a panoply of rights by pleading guilty, why can he not trade away but one of them? The Supreme Court of Indiana said, "In the context of plea-bargaining, we do not see a material distinction in the discretionary powers of the prosecutor in offering to agree to a lesser sentence for a guilty plea or for a bench trial." *Corcoran v. State*, 739 N.E.2d 649, 654 (Ind. 2000) (emphasis added). Though as discussed, no plea is involved in the second offer. Nevertheless, the State Supreme Court saw no material distinction between the two offers. If it was the prosecutor's goal to dissuade the defendant from demanding a jury trial, he failed. The defendant demanded a jury trial and he got it. Furthermore, the defendant had the

right to waive a jury trial, so what error is caused by receiving a benefit for choosing to exercise a lawful option? So too, the prosecutor had the authority to seek the death penalty or not, so what error is caused by conditionalizing his discretion?

When one pleads guilty, many rights are waived. Could the prosecutor have legitimately offered a different deal based on one of those other rights that are also relinquished as a part of a guilty plea? Could he have offered to waive the death penalty in exchange for waiving the Fifth Amendment right against self-incrimination merely to permit the prosecutor to comment on the defendant's failure to take the stand in his own defense? This would certainly simplify appeals involving whether the prosecutor strayed too far in closing argument. Could the death penalty be traded for the Sixth Amendment right to a public trial thereby permitting a secret adjudication? Alternatively, could the death penalty be swapped for the Sixth Amendment right to call witnesses in his defense? Further, could it be bartered for the Sixth Amendment right to confront and cross examine witnesses against him thereby barring the defendant and his counsel from observing the state's case in chief? This would transform the petit jury into more of a grand jury. What about conditioning the death penalty on surrendering the Sixth Amendment right to an impartial jury by requiring the defendant to waive his right to participate in jury selection or to comment on the prosecutor's challenges during *voir dire*? Then again, a defendant has the right to fire his lawyer and proceed *pro se*, so could the death

penalty be conditioned on relinquishing his Sixth Amendment right to counsel and proceeding at trial unrepresented?

The reason that these theoretical prosecutorial offers offend our sensibilities is not because the death penalty is used as a bargaining chip, after all it is clearly a bargaining chip when it is offered in exchange for a guilty plea. Rather, the visceral reaction arises because what is traded in exchange is not a confession of the truth of the criminal allegations, but the very procedural safeguards we have enacted to protect the judicial process. Such offers do more than attempt to abrogate a single individual's rights, they tinker with the rules that promote societal trust in our system of justice. It is beyond doubt that prosecutors can negotiate for guilty pleas. What they cannot do is strike a deal whose object is nothing more than a punishment for the exercise of a constitutional right.

This is not a new legal principle. In striking down the death penalty provisions of the Federal Kidnaping Act, the United States Supreme Court determined that the death penalty cannot be conditioned on a jury trial demand.

> Under the Federal Kidnaping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. Our problem is to

decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. But, as the Government notes, limiting the death penalty to cases where the jury recommends its imposition does have another objective: It avoids the more drastic alternative of mandatory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnaping Act may be viewed as ameliorating the severity of the more extreme punishment that Congress might have wished to provide.

The Government suggests that, because the Act thus operates to mitigate the severity of punishment, it is irrelevant that it may have the incidental effect of inducing defendants not to contest in full measure. We cannot agree. Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and

> therefore excessive. In this case the answer to that question is clear. The Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial.

United States v. Jackson, 390 U.S. 570, 581-82 (1968) (footnotes, quotation marks, and citations omitted; emphasis added). A decade later, the United States Supreme Court contrasted plea bargaining with merely punishing the exercise of a constitutional right.

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional. But in the give-and-take of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citations and quotation marks omitted).

The Supreme Court of Indiana wrote that it did, "not see a material distinction in . . . offering to agree to a lesser sentence for a guilty plea or for a bench trial." *Corcoran v. State*, 739 N.E.2d 649, 654 (Ind. 2000).

That ruling was an unreasonable application of these clearly established United States Supreme Court precedents. Twice the United States Supreme Court discussed and contrasted guilty pleas with negotiations which merely penalized the exercise of a constitutional right. In both instances, the later was criticized. In *Jackson*, the focus was on the penalty and the discussion of plea bargaining was used in contrast. In *Bordenkircher*, the focus was on plea bargaining and the discussion of penalties was used as a contrast. Nevertheless, in both instances, the court was consistent in stating that a material distinction existed between agreeing to a lesser sentence in return for a guilty plea as opposed to doing so in return for a bench trial or any other procedural constitutional right.

The Supreme Court of Indiana wrote that it considered an offer conditioned on a bench trial to be within "the discretionary powers of the prosecutor . . .." *Corcoran v. State*, 739 N.E.2d 649, 654 (Ind. 2000). That ruling was objectively unreasonable. Though *Jackson* specifically addressed an act of Congress, its legal principle was not so narrowly tailored. Prosecutorial discretion is broad, but there is no basis for accepting that the executive branch can implement an *ad hoc* offer where the legislative branch is prohibited from accomplishing the same result after public deliberation. Furthermore, *Bordenkircher* explicitly stated that an agent of the state could not penalize a person's reliance on a constitutional right. *Bordenkircher* was focused on plea bargaining and prosecutors were clearly the state agents being most prominently discussed.

In addition to *Bordenkircher*, the Supreme Court of Indiana also cited *Hill v. State*, 499 N.E.2d 1103, 1107 (Ind. 1986) and *Pauley v. State*, 668 N.E.2d 1212, 1213 (Ind. 1996) in reaching its decision. Nothing in this opinion should be read to question the accuracy or legitimacy of *Hill* and *Pauley*, only their applicability to the facts of this case. Both *Hill* and *Pauley* involved a defendant who chose not to plead guilty, proceed with a jury trial, and was given a longer sentence than an accomplice. Though the language of both cases said that the defendant exercised his right to a jury trial (which they did), the question in those cases was whether the defendants were penalized because they did not plead guilty. Neither of those cases addressed the question of whether the trials were to a jury or to the bench. Thus both *Hill* and *Pauley* were about guilty pleas, not about waiving a jury and being tried by a judge. Therefore neither of them are applicable to the fact pattern of this case.

The only additional case the respondent discusses is *Corbitt v. New Jersey*, 439 U.S. 212 (1978), but it is of no benefit to the respondent because as the United States Supreme Court stated,

> There is no difference of constitutional significance between *Bordenkircher* and this case. There, as here, the defendant went to trial on an indictment that included a count carrying a mandatory life term under the applicable state statutes. There, as here, the defendant could have sought to counter the mandatory penalty by tendering a plea. In *Bordenkircher*, as permitted

> by state law, the prosecutor was willing to forgo the habitual criminal count if there was a plea, in which event the mandatory sentence would have been avoided. Here, the state law empowered the judge to impose a lesser term either in connection with a plea bargain or otherwise. In both cases, the defendant gave up the possibility of leniency if he went to trial and was convicted on the count carrying the mandatory penalty. In *Bordenkircher*, the probability or certainty of leniency in return for a plea did not invalidate the mandatory penalty imposed after a jury trial. It should not do so here, where there was no assurance that a plea would be accepted if tendered and, if it had been, no assurance that a sentence less than life would be imposed. Those matters rested ultimately in the discretion of the judge, perhaps substantially influenced by the prosecutor and the plea-bargaining process permitted by New Jersey law.

Corbitt v. New Jersey, 439 U.S. 212, 221-222 (1978) (footnotes omitted). *Corbitt*, like *Hill* and *Pauley*,is about the juncture between pleading guilty or going to trial, not about whether to be tried by a judge or a jury. *Corbitt* involved the legislative decision to codify the constitutionally permissible prosecutorial option of leniency in return for a guilty plea. That is to say, the United States Supreme Court, by analogizing *Corbit* to *Bordenkircher*, agreed that the legislature can do through public deliberation what the executive can do through a plea bargain. The distinction between the statutes in *Corbitt* and *Jackson* is that *Corbitt* avoided the bench trial vs.

jury trial conflict that caused the death penalty provisions of the statute in *Jackson* to be struck down.

> The cases in this Court since *Jackson* have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no *per se* rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. The plea may obtain for the defendant the possibility or certainty not only of a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty, but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury.

Corbitt v. New Jersey, 439 U.S. 212, 220 (1978) (footnotes, quotation marks, ellipsis, brackets, and citations omitted). *Corbitt* does not permit conditionalizing the death penalty on waiving a jury trial and proceeding with a bench trial instead.

Here, the petitioner was punished when he refused to waive his right to a jury trial and agree to allow a judge to determine his guilt. The time sequence of such an offer and the filing of death penalty charges is not relevant. That is to say, it does not matter whether the offer is to dismiss previously filed charges or to refrain from filing in the future. The constitutional taint is the same. Nevertheless, the sequence of events in this case is important. The

petitioner was charged with murder and negotiations ensued. Though it is not clear when they began, nor how long they lasted, what is clear is that nine and a half months later they ended when, on the record, the prosecution withdrew from further discussions and announced the intent to seek the death penalty. Trial Record at 151. The petitioner did not agree to be tried by a judge sitting without a jury and as a direct consequence, the prosecutor sought the death penalty. But for his demand for a jury trial, rather than a bench trial, he would not have faced the death penalty.

Because the Supreme Court of Indiana did not see any material distinction between a guilty plea and the waiver of the right to a jury trial, it did not attempt to identify any other purpose or effect for the waiver of this procedural constitutional right. Neither has the respondent advanced any. In this way, it as if neither fully grasp the difference between refusing to plead guilty and demanding a trial, as opposed to, refusing to consent to a bench trial and demanding a jury trial. Without any possible explanation otherwise presented, the court can find no necessary reason to warrant the excessive effect of punishing the petitioner's assertion of his right to a jury trial rather than consenting to a bench trial. *See Jackson* at 582. Therefore it is the holding of this court that the prosecution unconstitutionally penalized the petitioner by seeking the death penalty when the petitioner refused to consent to the prosecution's offer to forgo the death penalty in exchange for the defendant's consent to waive a jury trial and proceed

with a determination of guilt by the judge. This offer by the prosecution was a violation of the petitioner's Sixth Amendment right to a jury trial.

As a remedy for this constitutional violation, the petitioner seeks a new trial. Traverse at 28, ¶ 2, docket # 39. A new trial is not the appropriate relief. Neither the prosecution's offer nor the charged death penalty denied the petitioner a fair trial. The petitioner wanted a jury trial and he had a jury trial. A jury found him guilty of these four homicides. Nothing about the offer or the charged death penalty impugned the fairness of his jury trial. Therefore a new trial is neither necessary nor appropriate. As discussed, the unconstitutional punishment was seeking the death penalty. The correct remedy is to remove the punishment caused by the filing of death penalty charges; this only requires re-sentencing to other than a death sentence. Such a remedy is consistent with the remedy provided in *Jackson*. There the court struck down the death penalty provisions of the Federal Kidnaping Act, but left balance of the law. So too, here the death sentence must be struck down and the case remanded for re-sentencing without the option of re-imposing the death sentence.

V. GROUND 2 - SENTENCING ERRORS
GROUND 3 - UNCONSTITUTIONALITY OF THE INDIANA DEATH PENALTY STATUTE
GROUND 4 - PROSECUTORIAL MISCONDUCT DURING PENALTY PHASE
GROUND 7 - INCOMPETENT TO BE EXECUTED

The remedy sought for the errors alleged in Grounds 2 and 3 is re-sentencing. Traverse at 29, ¶¶ 3 and 4, docket # 39. In light of the court's conclusion that re-sentencing is required as a result of Ground 1, the court declines to further address Grounds 2 or 3.

The remedy sought for Ground 4 is remand for a review of the merits of the alleged prosecutorial misconduct during the penalty phase. Traverse at 29, ¶¶ 5, docket # 39. Given this court's conclusion that re-sentencing is required as a result of Ground 1, any possible error during the penalty phase is rendered moot. Therefore the court declines to further address Ground 4.

In Ground 7, the petitioner argues that he is not competent to be executed. Re-sentencing based on Ground 1 to a sentence other than the death penalty renders this challenge moot. Therefore the court declines to further address Ground 7.

VI. GROUND 5 - INCOMPETENCY TO STAND TRIAL

The petitioner argues that he was incompetent during his state trial. The respondent argues that this claim is procedurally defaulted. In his traverse, the petitioner argues that claims of competency at trial cannot be waived and can be raised at any time. This simply is not true.

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas

> review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991) (emphasis added). The petitioner does not argue that the state court rulings were not made pursuant to independent and adequate procedural rules. Rather, the petitioner cites *Pate v. Robinson*, 383 U.S. 375 (1966); *Gosier v. Welborn*, 175 F.3d 504 (7th Cir. 1999); *Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir. 1997); and *Matheney v. Anderson*, 60 F.Supp.2d 846 (N.D. Ind. 1999) in support of his position.

Pate does not speak to the question of procedural default nor whether trial competency can be challenged for the first time in a habeas proceeding. But even if it did, the holding in *Coleman*, coming as it did 33 years after *Pate*, would still be controlling. In *Pate*, the competency question had been raised and addressed by the state supreme court. See *Pate v. Robinson*, 383 U.S. 375, 387 (1966) (Harlan, J., dissenting) ("The facts now canvassed by this Court to support its constitutional holding were fully sifted by the Illinois Supreme Court."). Therefore, *Pate* offers no assistance in deciding whether competency for trial can be raised for the first time in a habeas petition.

The three lower court rulings cited by the petitioner are all more recent than *Coleman*, but they could not

supercede it and are nevertheless inapplicable. *Gosier* does squarely address the question of procedural default. Its holding is based on confusion in Illinois law as to whether or not trial competency must be raised on direct appeal. "A defendant reading the state court's opinions would not think it necessary to raise this issue on direct appeal, and the forfeiture doctrine therefore does not bar collateral review in federal court." *Gosier v. Welborn*, 175 F.3d 504, 507 (7th Cir. 1999). Though it does not use the word "adequate", *Gosier* is based on a determination that the state court ruling was not based on an adequate state procedural rule because it had not been consistently applied. Furthermore, the petitioner here has not argued that Indiana does not have an adequate procedural rule or that any such confusion exists in Indiana law.

Liegakos addressed a new interpretation of Wisconsin law by its supreme court which subsequently prevented collateral review of claims which could have been raised on direct appeal. Wisconsin applied this ruling retroactively to cases on direct appeal before the new rule was announced. The Seventh Circuit explicitly found that was, "not an 'adequate' state ground for appeals briefed before its announcement." *Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir. 1997). The petitioner, citing *Liegakos*, also argues that, "AEDPA does not apply due to the procedural default ruling." Traverse at 16, n.5, docket # 39. It is true that *Liegakos* found that 28 U.S.C. § 2254(d) only applied to claims adjudicated on the merits in State court proceedings, but §2254(d) is not in question in regard to this

ground. The procedural default question turns on whether these claims were exhausted as required by 28 U.S.C. § 2254(b)(1)(A).

Matheney contains dicta saying that competency for trial can be raised at any time, but that question was not at issue in *Matheney* because competency had been raised to the Indiana Supreme Court. "Thus, it appears that Matheney properly raised the claims before the state court." *Matheney v. Anderson*, 60 F. Supp. 2d 846, 860 (N.D. Ind. 1999). On appeal, the Seventh Circuit also found that the issue had been raised and addressed by the Indiana Supreme Court. *Matheney v. Anderson*, 253 F.3d 1025, 1038 n.15 (7th Cir. 2001) ("The Indiana Supreme Court held: (1) Matheney was competent to stand trial . . ..").

Therefore, pursuant to *Coleman*, this ground is barred from habeas review unless he can demonstrate cause and prejudice or a fundamental miscarriage of justice. The petitioner has made no effort to demonstrate either. Though he repeatedly argues that he is mentally ill and not competent, these are not external factors demonstrating cause for procedural default.

> We have never considered whether mental illness can constitute cause for default. However, *Cawley v. Detella*, 71 F.3d 691 (7th Cir. 1995), is instructive on this question. In *Cawley*, we held that the petitioner's depression did not constitute cause because it failed "to qualify as an external impediment." *Id.* at 696. We are also guided by other circuits that have considered the

issue. In *Hull v. Freeman*, 991 F.2d 86 (3d Cir. 1993), the Third Circuit determined that petitioner's borderline mental retardation did not establish cause because it was not "external" to his defense within the meaning of *Murray v. Carrier*, [477 U.S. 478, 488 (1986)]. [*Hull*,] 991 F.2d at 91. The Ninth Circuit, in *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988), held that petitioner's diagnosis as a "borderline mental defective" was insufficient to establish cause. *See also Cornman v. Armontrout*, 959 F.2d 727, 729 (8th Cir. 1992) (finding petitioner's below average intelligence insufficient to establish cause). Furthermore, it is well established in this Circuit that circumstances such as youth, lack of education, and illiteracy are not external impediments within the context of excusing procedural default. *See, e.g., Dellinger v. Bowen*, 301 F.3d 758, 763 (7th Cir. 2002) (petitioner's youth and lack of education did not constitute cause); *Henderson v. Cohn*, 919 F.2d 1270, 1272-73 (7th Cir. 1990) (petitioner's illiteracy and limited education insufficient to establish cause).

We find the reasoning in these cases persuasive. These cases highlight the emphasis placed on the "external" nature of the impediment. Something that comes from a source within the petitioner is unlikely to qualify as an external impediment. The examples given by the Court in *Murray* as to what constitutes an external impediment exemplify this point. Harris' low IQ and limited

> reading ability are not factors which are "external" to his defense.

Harris v. McAdory, 334 F.3d 665, 670 (7th Cir. 2003).

> Neither is there any basis for finding a fundamental miscarriage of justice.
>
> In order to show, alternatively, that a miscarriage of justice would result if habeas relief is foreclosed, the petitioner must show that he is actually innocent of the offense for which he was convicted, *i.e.*, that no reasonable juror would have found him guilty of the crime but for the error(s) he attributes to the state court. *Schlup v. Delo*, 513 U.S. 298, 327-29 (1995).

Lewis v. Sternes, 390 F.3d 1019, 1025-1026 (7th Cir. 2004) (parallel citations omitted). The petitioner here does not and has never argued that he is innocent of these four homicides.

Because the petitioner did not raise the question of his competency to stand trial in the state courts, and because he has not demonstrated either cause and prejudice nor the existence of a fundamental miscarriage of justice this ground is procedurally defaulted.

VII. GROUND 6 - INCOMPETENCY TO WAIVE DIRECT APPEAL CLAIMS

In his traverse, the petitioner concedes that this claim is procedurally defaulted. "Respondent is correct, as the record currently stands, the claim is procedurally defaulted." Traverse at 21, docket # 39.

VIII. GROUND 8 - INCOMPETENCY TO WAIVE POST-CONVICTION RELIEF CLAIMS

The petitioner argues that, "the state courts unreasonably found that Petitioner was competent and that he had knowingly, intelligently and voluntarily waived post-conviction review." Petition at 15, docket # 13. The respondent argues that the petitioner, "has no federal constitutional right to state collateral review . . . [but, regardless] the Indiana Supreme Court reasonably determined that Corcoran was competent to waive post-conviction proceeding by the standards set for by both *Dusky* and *Rees*." Return at 22-23, docket # 33. The petitioner replies that, "[i]n *St. Pierre v. Cowan*, 217 F.3d 939 (7th Cir. 2000), the Seventh Circuit lifted procedural bars based on a state court's incorrect determination of a waiver of state post-conviction remedies." Traverse at 23, docket # 39.

St. Pierre is not applicable here. First, it is not based on current law. *See St. Pierre v. Cowan*, 217 F.3d 939, 940 (7th Cir. 2000) ("Applying the legal standards that obtained before the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214, we conclude that . . .."). In this case, the four homicides occurred in 1997, after the passage of AEDPA. Currently, the law requires that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (emphasis added). The Supreme Court of Indiana adjudicated the petitioner's claim that he was not competent to waive his post-conviction claims. Therefore only United States Supreme Court cases can be used to determine the reasonableness of the state's determination. Because *St. Pierre* was decided by the Seventh Circuit, it is not relevant to this analysis.

The Supreme Court of Indiana provided the following analysis of the petitioner's competency to waive post-conviction review of his conviction and sentence.

> The State Public Defender attacks the trial court's competency determination on three grounds. First, she argues that the trial court applied an improper standard to determine competency. Second, she contends as a factual

matter that Corcoran is incompetent to waive post-conviction review under any competency standard this Court might choose to employ. Third, she maintains that as a result of Corcoran's incompetence, he could not knowingly, voluntarily, or intelligently waive his right to post-conviction relief.

A

The State argues that the proper standard for determining the level of competency necessary for Corcoran to waive his right to post-conviction review was that set forth in *Dusky v. United States*, 362 U.S. 402 (1960) (per curium). In *Dusky*, the Supreme Court held that a defendant is competent to stand trial if "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and . . . has a rational as well as factual understanding of the proceedings against him." 362 U.S. at 402. The State relies on this standard in part because it is consistent with Indiana Code section 35-36-3-1, Indiana's statutory trial competency standard.

The State Public Defender argues that the proper competency standard is that announced in *Rees v. Peyton*, 384 U.S. 312 (1966) (per curiam). In *Rees*, the Supreme Court held that a capital defendant may withdraw a petition for certiorari only after it is determined whether "he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may

substantially affect his capacity in the premises." *Rees*, 384 U.S. at 314.

We are constrained to say that we find little if any difference between the standards enunciated in *Dusky* and *Rees*. *See Godinez v. Moran*, 509 U.S. 389, 398 n.9 (1993) (acknowledging that the difference between the *Dusky* and *Rees* standards is not readily apparent and may only be one of terminology). A number of federal courts that have faced this question have been unable, or felt it unnecessary, to attempt to discern a difference between the two tests. *See Dennis v. Budge*, 378 F.3d 880, 889 (9th Cir. 2004) (refusing to resolve whether there is any difference between the *Rees* and *Dusky* standards because the analytical outcomes under each test would be the same); *Michael v. Horn*, 2004 U.S. Dist. LEXIS 3702 (M.D. Pa. 2004) (relying on both the principles of *Rees* and *Dusky* to determine competency to forego a collateral challenge); *Groseclose v. Dutton*, 594 F. Supp. 949, 957 n.4 (M.D. Tenn. 1984) (stating that *Dusky* is analytically equivalent to the *Rees* competency test).

Federal courts have been unwilling or unable to distinguish between the *Rees* and *Dusky* standards because both tests "highlight[] the constitutional necessity that a criminal defendant understand the proceedings and then be capable of aiding his legal counsel in choosing among legal alternatives." *Groseclose*, 594 F. Supp. at 957 n.4. Under both standards, the inquiry focuses on the individual's "discrete capacity to understand and make rational

decisions concerning the proceedings at issue . . ." *Mata v. Johnson*, 210 F.3d 324, 329 n.2 (5th Cir. 2000). Further, neither test treats "the presence or absence of mental illness or brain disorder [as] dispositive" proof of incompetence, but balances its presence or absence with other evidence. *Id.* Both tests appear to be equivalent in that each is applied in the same way to determine whether an individual has the capacity to comprehend the legal proceedings with which he or she is confronted and assist his or her counsel in choosing among the various legal alternatives.

For these reasons, we will evaluate the post-conviction court's competency determination under the principles of both standards.

B

We have previously been required to review a post-conviction court's competency determination in a capital proceeding. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). In *Timberlake*, we held that a post-conviction court's competency findings are afforded a high level of deference by a reviewing court. The court's decision will be disturbed only "if the evidence is without conflict and leads only to a conclusion contrary to the result of the post[-]conviction court." *Id.* at 597.

The post-conviction court here acknowledged in its written findings that Corcoran suffers from a mental illness. The State also concedes that Corcoran suffers from a mental illness. At the competency hearing, the State Public Defender presented the testimony of three mental health experts, each of whom concluded that Corcoran

suffers from paranoid schizophrenia. One of the symptoms of Corcoran's condition, according to the three experts, are recurrent delusions that Department of Correction prison guards are torturing him through the use of an ultrasound machine, causing him substantial pain and uncontrollable twitching.

On the basis of this diagnosis, all three experts concluded Corcoran was unable to make a rational decision concerning the legal proceedings confronting him. Each expert stated that Corcoran's decision to forego post-conviction review of his sentence, thereby hastening his execution, was premised on his desire to be relieved of the pain that he believes he experiences as a result of his delusions. To follow the experts' logic, Corcoran's decision to forego post-conviction review cannot be rational if based upon his delusions, which are irrational.

Corcoran, however, made no statement to any of the experts evaluating him indicating that he wished to end his appeals in order to escape his paranoid delusions. Corcoran's prison medical records and the testimony of each expert indicated that his psychotic symptoms were being controlled through various psychiatric medications. Corcoran himself spoke directly to his reasons for not pursuing post-conviction review and the contention that his delusions were prompting his actions at the post-conviction hearing stating:

> See, I want to waive my appeals because I am guilty of murder. I think that I should be executed for what I have done and not because

> I am supposedly tortured with ultrasound or whatever. I am guilty of murder. I should be executed. That is all there is to it. That is what I believe. I believe the death penalty is a just punishment for four counts of murder, and I believe that I should be executed since I am guilty of four counts of murder.

(Super. Ct. Hr'g Tr. at 89). Corcoran's explicit denial that his delusions prompted him to waive his right to post-conviction review and his reasoning that his death sentence is commensurate with the crime he committed (the conclusion to which both the original trial court jury and judge came), makes it impossible for this Court to conclude that "the evidence is without conflict and leads only to a conclusion contrary to the result of the post[-]conviction court." *Timberlake*, 753 N.E.2d at 597.

Moreover, there is substantial evidence of record that Corcoran was aware of his legal position and the consequences of his decision to forego any further post-conviction review. When asked whether Corcoran has the capacity to understand his legal position, Dr. George Parker, who evaluated Corcoran in preparation for his post-conviction hearing stated:

> He has a very clear awareness of the status of his case. He is aware he has been sentenced to death. He is aware that he is in the appeals process. He has a good memory of the events that have taken place from the time of the offense to the trial, to the sentencing phase, and then through the more extensive appeals phase. He is aware of the attorneys' positions

> and how, how the attorneys have changed over the course of the trial and then [the] appeals process. So, he has a good understanding of what is at issue.

(Super. Ct. Hr'g Tr. at 48). Dr. Robert Kaplan, who also evaluated Corcoran, testified that Corcoran was aware that by not continuing with post-conviction review that he would be executed.

Corcoran was questioned directly by both the State's attorney and the presiding judge regarding his awareness of the proceedings and his legal position. The State's attorney asked the following questions:

> Question: Do you understand that by waiving these appeals, you are going to make that happen (his execution) relatively soon?
>
> Corcoran: Yes, I understand.
>
> Question: Do you understand that this appellate process is the opportunity for you to fight to stay alive?
>
> Corcoran: Yes, I understand.
>
> Question: And you are willing to accept the sentence that was handed down by this Court?
>
> Corcoran: Correct.

(Super. Ct. Hr'g. Tr. at 13).

The post-conviction court then questioned Corcoran with respect to the entire history of his case. Corcoran stated that he was aware that he had been convicted of four capital crimes. He related that he understood the purpose of his initial direct appeal to the Indiana Supreme Court to review his death sentence and that his appeal had been unsuccessful. The judge then

asked the following questions in order to ascertain Corcoran's level of awareness of the post-conviction proceedings taking place:

> The Court: [Do] you understand that these proceedings are your last attempt to review this case?
>
> Corcoran: Yes, I understand.
>
> The Court: Do you also understand that if the review here, were it necessary up on appeal, is unsuccessful, that you would be executed?
>
> Corcoran: Yes, I understand.
>
> The Court: Has anyone, Mr. Corcoran, forced you to waive your rights to appeal?
>
> Corcoran: No.
>
> The Court: Has anyone threatened you to waive your rights to appeal?
>
> Corcoran: No.
>
> The Court: Did anybody tell you, anybody at all, tell you that you would get more favorable treatment if you waived your right to appeal?
>
> Corcoran: No.
>
> The Court: You understand that the two ladies sitting to your left are appointed by the Court to represent you?
>
> Corcoran: Right, yes.
>
> The Court: Do you trust their judgment?
>
> Corcoran: I disagree with them, but I trust their judgment
>
> The Court: What do you disagree with them about?
>
> Corcoran: They didn't have to call a competency hearing, but they did anyway. I disagree with calling the competency hearing.

> The Court: You disagreed with them filing that motion?
> Corcoran: Correct.
> The Court: And you understand what their (defense attorneys') responsibilities are?
> Corcoran: Yes.
> The Court: And what [the deputy attorney general's] responsibilities are?
> Corcoran: Yes.
> The Court: And what my responsibilities are?
> Corcoran: Yes.
> The Court: And you know what we are doing here today?
> Corcoran: Yes.
> The Court: What were we doing here today?
> Corcoran: Determining my competency whether or not I am able to make a decision or not.

(Super. Ct. Hr'g Tr. at 87-88). Both the State's and post-conviction judge's questioning of Corcoran reaffirm the testimony of Dr. Parker that Corcoran was able to appreciate the gravity of his legal position and the consequences of his choice to waive further post-conviction review. The portions of the record described and set forth supra are also sufficient evidence to support the post-conviction court's determination that Corcoran made his choice knowingly, voluntarily, and intelligently.

Corcoran's awareness of his legal position and his ability to formulate a rational justification for forgoing further post-conviction review make him competent to waive such review under either *Rees* or *Dusky*. The evidence supports the

> trial court's conclusion that Corcoran has both a rational understanding of and can appreciate his legal position. Further, the evidence does not conclusively indicate that Corcoran's decision was not made in a rational manner. Thus, we are unable to conclude that "the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court," and so we affirm its competency finding. *Timberlake v. State*, 753 N.E.2d at 597 (*citing Harrison v. State*, 707 N.E.2d 767, 773 (Ind. 1999)).

Corcoran v. State, 820 N.E.2d 655, 658-662 (Ind. 2005) (footnotes and parallel citations omitted; brackets in original).

The petitioner would have this court review and re-weigh the evidence presented during his state competency hearing. Though the court has reviewed this record, it cannot re-weigh the testimony because that is not permitted under §2254(d) or (e). The Supreme Court of Indiana's determination is neither an unreasonable application of United State's Supreme Court law nor an unreasonable determination of the facts. The petitioner has not presented clear and convincing evidence to rebut the presumption of correctness given to the State Court's factual findings.

The petitioner argues that he does not meet the test set out in *Rees*, but he appears to ignore the word "substantially" as applied in the later prong of the test.

> [W]hether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

Rees v. Peyton, 384 U.S. 312, 314 (1966) (emphasis added). The state courts acknowledged that the petitioner suffers from a mental illness and fully confronted this question. In the end they determined that his mental illness did not substantially affect his capacity to appreciate his position as a death row inmate and that he understood how and why he was there. Neither did his mental illness impact his understanding of his legal position *vis-à-vie* his appeals. Though philosophically one can question whether it can ever be a rational choice to abandon appeals which are the only means to avoid the death penalty, legally even *Rees* leaves no doubt that it is possible to do so. From a legal perspective, the state court's determination that the petitioner made a rational choice as not unreasonable.

The opinion of the Supreme Court of Indiana, as presented above, is thorough, thoughtful, and reasonable. Therefore no relief can be granted on this ground.

IX. CONCLUSION

For the foregoing reasons, the court now **GRANTS** the petition with respect to Ground 1. The court declines to address Grounds 2, 3, 4, and 7 because

they are rendered moot by granting the petition on Ground 1. The court **DENIES** the petition as to Grounds 5 and 6 because they are procedurally defaulted. The court **DENIES** the petition as to Ground 8 because the Supreme Court of Indiana was not unreasonable in determining that Joseph Edward Corcoran was competent to waive post-conviction review of his conviction and sentence.

The Great Writ is now **GRANTED** on Ground 1 conditioned upon the State of Indiana resentencing Joseph Edward Corcoran to a sentence other than the death penalty within 120 days of this order.

IT IS SO ORDERED.
ENTERED: April 9, 2007

S/ ALLEN SHARP
ALLEN SHARP, JUDGE
UNITED STATES DISTRICT COURT

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IN THE
INDIANA SUPREME COURT

JOSEPH E. CORCORAN,	)
	)
Appellant (Defendant),	)
	)
v.	)
	)
STATE OF INDIANA,	)
	)
Appellee (Plaintiff).	)

Cause No. 02S00-9805-DP-293

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-9707-CF-465

September 5, 2002

SHEPARD, Chief Justice

Joseph E. Corcoran was under stress because his sister's upcoming marriage would necessitate his moving out of her house. And his brother said Corcoran could not move in with him.

He awoke one afternoon to hear his brother and others downstairs talking about him. Irritated, he loaded his rifle and went downstairs to intimidate them, but as Corcoran said later, "It just didn't happen that way." (R. at 1988.) Corcoran killed his brother, his sister's fiancé, and two other men in the ensuing incident.

We affirm the trial court's sentence of death.

Facts & Procedural History

This case returns to us following a remand. Corcoran v. State, 739 N.E.2d 649 (Ind. 2000). We directed the trial court to reconsider its earlier sentence and sentencing order.

At trial, the State charged Corcoran with four counts of murder and requested the death penalty.

The jury found Corcoran guilty of all four counts and recommended the death penalty. The trial court imposed it. We found a significant possibility that the trial judge's original sentencing order relied on non-statutory aggravators in imposing the death penalty and remanded for the trial court to redetermine whether to impose death based only on statutory aggravating circumstances. Corcoran, 739 N.E.2d at 657.

After re-weighing the aggravating and mitigating circumstances of the quadruple murder, the trial court issued a revised sentencing order and again imposed the death sentence. In response to our remand order, the trial judge stated:

> The Court, having evaluated and balanced all these circumstances, finds that the aggravating circumstances outweigh the mitigating circumstances. The Court again finds that the mental or emotional disturbance suffered by [Corcoran] did not affect his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.
>
> The Court, having considered the jury's recommendation that the death penalty be imposed, now finds that such a sentence is supported by the facts and the evidence, and the character of [Corcoran], and therefore orders that [Corcoran] be executed pursuant to Indiana law . . . .

(Supp. R. at 49.)

Corcoran argues on appeal that the trial court improperly considered non-statutory aggravators and failed to consider all proffered mitigators. (Appellant's Br. at 2-3.) We will also consider Corcoran's final claim from his original direct appeal: whether the death sentence is manifestly unreasonable.[1]

I. Aggravating & Mitigating Circumstances

Corcoran points to the following portion of the revised sentencing order to support his argument that the trial court again improperly considered non-statutory aggravators:

> The trial Court, in balancing the proved aggravators and mitigators, emphasizes to the Supreme Court that it only relied upon those proven statutory aggravators. The trial Court's remarks at the sentencing hearing, and the language in the original sentencing order explain why such high weight was given to the statutory aggravator of multiple murder, and further support the trial Court's personal conclusion that the sentence is appropriate punishment for this offender and these crimes.

(Supp. R. at 48-49.) He also argues that the revised sentencing order is deficient because the trial court

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1 Because we found Corcoran's claim regarding the trial court's consideration of non-statutory aggravators dispositive, we did not reach this issue in his original appeal. See Corcoran, 739 N.E.2d at 651, 658 n.7.

found as proven only four of the ten mitigating circumstances he put forward. (Appellant's Br. at 8-9.)

In Harrison v. State, 644 N.E.2d 1243, 1262 (Ind. 1995), after remand, 659 N.E.2d 480 (Ind. 1995), cert. denied, 519 U.S. 933 (1996), we held that a court must offer a detailed explanation of the factors and the weighing process that lead to a death sentence. For guidance, we set out the following steps:

> The trial court's statement of reasons (i) must identify each mitigating and aggravating circumstance found, (ii) must include the specific facts and reasons which lead the court to find the existence of each such circumstance, (iii) must articulate that the mitigating and aggravating circumstances have been evaluated and balanced in determination of the sentence, and (iv) must set forth the trial court's personal conclusion that the sentence is appropriate punishment for this offender and this crime.

Id. (citations omitted).

When imposing a death sentence, a trial court must limit its consideration of aggravating circumstances to those listed in the death penalty statute, Ind. Code Ann. § 35-50-2-9(b) (West 2000). Stephenson v. State, 742 N.E.2d 463, 500 (Ind. 2001), cert. denied, 122 S. Ct. 905 (2002). To satisfy the specificity requirement of Harrison, the sentencing order must "explicitly indicate which mitigating circumstances the trial court found . . .

[and] explain the specific facts and reasons that led the court to find the existence of whatever mitigating circumstances it did find." Holsinger v. State, 750 N.E.2d 354, 362 (Ind. 2001).

"We require such specificity in a sentencing order or statement of reasons for imposing a sentence to insure the trial court considered only proper matters when imposing sentence, thus safeguarding against the imposition of sentences which are arbitrary or capricious, and to enable the appellate court to determine the reasonableness of the sentence imposed." Harrison, 644 N.E.2d at 1262 (citation omitted)

When we remand criminal cases to trial courts for new sentencing orders, a trial court's responsibility is to "produce a new sentencing order that responds to the concerns this Court has raised." O'Connell v. State, 742 N.E.2d 943, 952-53 (Ind. 2001). Our sole concern here was the possibility that the trial court relied on non-statutory aggravators, so it fulfilled its responsibility by "issuing a new sentencing order without taking further action." Id. at 953.

We are now satisfied that the trial court has relied on only aggravators listed in Indiana Code § 35-50-2-9(b). In response to our remand, the trial court stated, "[I]n balancing the proved aggravators and mitigators, [the trial court] emphasizes to the Supreme Court that it only relied upon those proven statutory aggravators." (Supp. R. at 48-49.) There is

no lack of clarity in this statement and no plausible reason to believe it untrue.

As for the trial court's consideration of mitigating circumstances, Corcoran proffered ten mitigators, but the court found that he proved only four. (Supp. R. at 47-48.) The Court then stated:

> The Court finds that the Defendant has proved the mitigating circumstance that he was under the influence of a mental or emotional disturbance at the time the murders were committed on July 26, 1997. The Court gives this mitigating circumstance medium weight. Dr. Engum's opinion at trial was consistent with the opinions of the Court appointed experts that the Defendant suffered from a personality disorder, either paranoid personality disorder, or schizotypal personality disorder.
>
> The Defendant requests the Court to consider as a further mitigating circumstance the fact he cooperated fully with investigating authorities, reducing the potential for additional harm and furthering the State's case against himself. The Court does believe this to be a mitigating circumstance. The Defendant did in fact cooperate with the police and gave a videotaped confession of his involvement. At no time did he deceive or hinder the investigative process by making false or misleading statements. However, as he was the only adult left alive in the house, it would not have been difficult for the police to investigate and

> determine who was responsible. The Court therefore assigns this mitigator a low weight.
>
> The Defendant's eighth mitigator is his lack of a significant criminal history. The Defendant has a 1993 conviction for Criminal Mischief as a Class A Misdemeanor. He has no juvenile adjudications. The Court assigns this mitigator a low weight.
>
> Finally, the Defendant's remorse is advanced as a mitigating circumstance. The Defendant has indicated such remorse in a letter to the Court. The Court assigns this mitigator a low weight.

(Supp. R. at 47-48.)

Corcoran's argument that the trial court did not consider six of the proffered mitigating circumstances is without merit. As the mitigating circumstances were not the focus of our concern, we are not surprised that the trial court's second order analyzed only those aggravating and mitigating circumstances it found pertinent to the task on remand.

The trial judge had in fact analyzed Corcoran's proffered mitigators in the course of its original sentencing. Our review of the record also persuades us that the trial court properly rejected the remaining factors in the original sentencing order. (R. at 2574-78.) Corcoran claimed first that his mental disease affected his capacity to appreciate or conform his conduct. (R. at 2574.) As we discuss

in greater detail below, the trial court did not err in rejecting it.

In a related vein, Corcoran also asked the court to consider the fact that he shielded his young niece from the bloodshed as a mitigator. (R. at 2575.) But this fact cuts both ways. His actions demonstrate a keen awareness of the events that were to follow, and suggest to us that his capacity to appreciate the criminality of his conduct was not inhibited.

Third, Corcoran argues that his mental disease prevented him from competently assisting in his defense, stemming primarily from his refusal of favorable plea recommendations offered by the State. (R. at 2574, 2909.) The State's pleas would have kept Corcoran in jail for life, but Corcoran rejected each. He chose instead to exercise his constitutional right to a jury trial, therefore creating the potential for a lesser sentence, a favorable jury recommendation, or an outright acquittal. Corcoran's choice will not act simultaneously as a mitigator for his benefit.

The remaining three factors are also without merit. Corcoran was twenty-two at the time of the murders, and offered his age as a mitigator. (R. at 2575, 2915.) Although chronological age is not the end of the inquiry for young adults, considering both the seriousness of this crime and the fact that Corcoran is well past the age of sixteen where the law requires special treatment, we find no abuse of discretion. See Monegan v. State, 756 N.E.2d 499,

504-05 (Ind. 2001). The fifth rejected factor was Corcoran's good behavior in jail prior to sentencing. (R. at 2575.) We agree with the trial court that this is expected of persons who are incarcerated. See Walter v. State, 727 N.E.2d 443, 448-49 (Ind. 2000). Even if it is an appropriate mitigator, its weight is modest and we find no abuse of discretion here either. Finally, Corcoran asserted that his admission of guilt through all phases of the legal process should be a mitigating circumstance. (R. at 2575.) Of course, Corcoran did not admit his guilt in the sense that one does in pleading guilty. Corcoran demanded a jury trial and subjected the victims' families and loved ones to a trial. The trial court did not abuse its discretion in declining to find this mitigator.

In accordance with our guidance in Harrison and Holsinger, the trial court explicitly identified the proven mitigating circumstances and listed the specific facts and reasons that led the court to find their existence. The trial court fulfilled its resentencing duties.

II. The Propriety of the Death Sentence

We also address Corcoran's final argument from his original appeal that his sentence is manifestly unreasonable. (Appellant's Br. at 55.)

Although Article VII, § 4 of the Indiana Constitution authorizes us to review and revise sentences, we will do so only when the sentence is "manifestly unreasonable in light of the nature of

the offense and the character of the offender." Ind. Appellate Rule 7(B). When reviewing death sentences, this standard stands more as a guidepost for our appellate review than an immovable pillar supporting a sentence decision. See Spranger v. State, 498 N.E.2d 931, 947 n.2 (Ind. 1986), cert. denied, 481 U.S. 1033 (1987).

The nature of the offense is clear; Corcoran and his defense team do not dispute the events. (R. at 1994-95, State's Exh. 77; R. at 2175-76; Appellant's Br. at 55.) On July 26, 1997, Corcoran was lying on his bedroom floor and heard men's voices. He became upset because he thought the men were talking about him and took a semi-automatic rifle downstairs to confront them. In the living room were four men, including Corcoran's brother and future brother-in-law, both of whom lived in the house with Corcoran.

Corcoran shot and killed Jim Corcoran, Scott Turner and Timothy Bricker at close range. The final victim, Doug Stillwell, tried to escape, but Corcoran chased him into the kitchen and shot him in the head.

Despite these uncontested facts, Corcoran argues vehemently that his mental health should be of utmost significance in determining his sentence. Seven qualified doctors analyzed Corcoran, (R. at 2904-08, Def.'s Pre-Sent. Memo. at 20-25), and while they offered varying opinions, (R. at 2907, Def.'s Pre-Sent. Memo. at 20-25), it appears that the consensus was that Corcoran suffered from schizotypal or

paranoid personality disorder. (R. at 2306; 2309-10, Def.'s Exh. C; 2904; 2908; Def.'s Pre-Sent. Memo. at 20-25.)

In Corcoran's pre-sentencing memorandum, the defense presented the opinions of two doctors who interviewed Corcoran in 1999, two years after the murders, and diagnosed him as suffering from "schizophrenia, paranoid type." (Def.'s Pre-Sent. Memo. at 23.) Moreover, Dr. Engum, who testified at the penalty phase of the trial, originally opined that Corcoran suffered from schizotypal personality disorder and later changed his opinion, "with [the benefit of] hindsight," to suggest that progression to schizophrenia was "possible." (Def.'s Pre-Sent. Memo. at 22.)

The trial court expressed understandable concern with these diagnoses. Each was performed two years after the murders and with the knowledge of the jury's death sentence recommendation. (R. at 2905-06; Def.'s Pre-Sent. Memo. at 22-25.) As Dr. Engum stated, "[A]n estimated 10 to 20 percent of patients with Schizotypal personality disorder eventually progress to full-blown schizophrenia." (Def.'s Pre-Sent. Memo. at 22.) Whether or not Corcoran had progressed to schizophrenia two years after the crime is immaterial; rather, we are concerned with his mental state at the time of the murders, which consensus says and the trial court found to be schizotypal personality disorder. (R. at 2904.) Corcoran does not assert on appeal that his subsequent mental illness prevents the imposition of the death penalty.

In addition to monitoring Corcoran's demeanor throughout trial, the court listened to and considered each of the doctor's reports. The trial judge said:

> The Court is not convinced that [Corcoran]'s affliction meets the legal definition of mental disease or defect. The Court notes that even the well respected psychiatrists and psychologists opinions (not only those who examined [Corcoran], but those contained in the literature submitted in the Sentencing Memorandums) can be viewed as ambiguous. The Court notes that all seven (7) Doctors offered differing opinions as to [Corcoran] and Dr. Spink admitted psychiatry is not an exact science and there are no black and white rules. The literature, and Dr. Engum's original opinion consider schizotypal or paranoid personality disorders to be maladaptive lifestyles. The facts reflect that [Corcoran] had the presence of mind to shield his young niece upstairs from the carnage he inflicted on innocent victims downstairs in the house on Bayer Avenue. He knew immediately what he had done, he knew at the time what he was doing, and he knew that what he was doing was wrong.

(R. at 2576.)

The trial judge's consideration of the evidence about Corcoran's mental health reflected a fair amount of care; she concluded that he suffered from schizotypal personality disorder. (R. at 2904, 2907.)

In other words, Corcoran was genetically predisposed to be a "loner" or "hermit." (R. at 2240, 2333.) The professional analysis of Corcoran portrayed him as a person with "social and interpersonal deficits" who experiences "discomfort with, and reduced capacity for close relationships." (R. at 2309, Def.'s Exh. C.)

We are satisfied that the trial court's decision that a quadruple killing was weightier than the proffered mitigation of Corcoran's mental health led the trial court to an appropriate sentence.

Conclusion

We affirm the sentence of the trial court.

Dickson, Sullivan, and Boehm, JJ., concur.
Rucker, J., dissents with separate opinion

IN THE
SUPREME COURT OF INDIANA

JOSEPH E. CORCORAN,	)
	)
Appellant-Defendant,	)
	)
v.	)
	)
STATE OF INDIANA,	)
	)
Appellee-Plaintiff.	)

Supreme Court Cause Number
02S00-9805-DP-293

September 5, 2002

RUCKER, Justice, dissenting

I respectfully dissent because I do not believe a sentence of death is appropriate for a person suffering a severe mental illness. Recently the Supreme Court held that the executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment of the United States Constitution. Atkins v. Virginia, ___ U.S. ___, 122 S. Ct. 2242, 2252 (2002). There has been no argument in this case that Corcoran is mentally retarded.[1] However, the

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1 By statute, Indiana prohibits the execution of the mentally retarded. See Ind. Code § 35-36-9-6.

underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency.

In that regard I associate myself with the dissenting opinion of Justice Pfeifer of the Ohio Supreme Court who noted:

> Mental illness is a medical disease. Every year we learn more about it and the way it manifests itself in the mind of the sufferer. At this time, we do not and cannot know what is going on in the mind of a person with mental illness. As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so. . . . I believe that executing a convict with a severe mental illness is a cruel and unusual punishment.

Ohio v. Scott, 748 N.E.2d 11, 20 (Ohio 2001) (Pfeifer, J., dissenting), cert. denied, 532 U.S. 1034 (2001). Addressing the federal constitutional claim the Supreme Court noted, "pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate." Atkins, ___ U.S. at ___, 122 S. Ct. at 2251. Apart from the federal constitution, Indiana has its own constitutional provision against cruel and unusual punishment.[2] Because Indiana's constitution affords

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2 See Ind. Const. art. I, § 16 (providing "Excessive bail shall not be required. Excessive fines shall not

even greater protection than its federal counterpart, I would hold that a seriously mentally ill person is not among those most deserving to be put to death. To do so in my view violates the Cruel and Unusual Punishment provision of the Indiana Constitution. Because Corcoran is obviously severely mentally ill, he should be sentenced to life without the possibility of parole, not death.

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be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense.").

STATE OF INDIANA)
)SS.
COUNTY OF ALLEN)

IN THE ALLEN SUPERIOR COURT
CRIMINAL DIVISION
CAUSE NO. 02D04-9707-CF-465

STATE OF INDIANA,)
Plaintiff)
)
v.)
)
JOSEPH EDWARD CORCORAN,)
Defendant)

Indiana Supreme Court
Cause No. 02S00-9805-DP-293

REVISED SENTENCING ORDER OF THE COURT

Pursuant to the Order of the Indiana Supreme Court, dated the 6th day of December 2000, vacating the death penalty and remanding the cause for a revised sentencing order, the trial Court issues its "Revised Sentencing Order Pursuant to I.C. 25-50-2-9," and pursuant to the Indiana Supreme Court's directives as follows:

The trial Court has reviewed the sentencing transcript, the written Pre-Sentence Investigation Report, the Defendant's Pre-Sentencing Memorandum, the Defendant's Supplemental

Sentencing Memorandum, and having heard and considered all the evidence now finds:

1. The Defendant is guilty of Murder, a felony, in Count 1, the knowing or intentional killing of James E. Corcoran.
2. The Defendant is guilty of Murder, a felony, in Count 2, the knowing or intentional killing of Doug Stillwell.
3. The Defendant is guilty of Murder, a felony, in Count 3, the knowing or intentional killing of Robert S. Turner.
4. The Defendant is guilty of Murder, a felony, in Count 4, the knowing or intentional killing of Timothy G. Bricker.

The Court finds that he State has proven beyond a reasonable doubt the aggravating circumstance that the Defendant committed the Murder in Count 1 by knowingly or intentionally killing the victim, James E. Corcoran, and the Defendant committed another Murder, killing Doug Stillwell or Robert S. Turner or Timothy G. Bricker. I.C. 35-50-2-9(b)(8). The Court accords this high weight.

The Court further finds that the State has proven beyond a reasonable doubt the aggravating circumstance that the Defendant committed the Murder in Count 2 by knowingly or intentionally killing the victim Doug Stillwell, and the Defendant committed another Murder, killing Robert S. Turner or Timothy G. Bricker or James E. Corcoran. I.C. 35-50-2-9(b)(8). The Court accords this high weight.

The Court further finds that the State has proven beyond a reasonable doubt the aggravating circumstances that the Defendant committed the Murder in Count 3 by knowingly or intentionally killing the victim Robert S. Turner, and the Defendant committed another Murder, killing Timothy G. Bricker or James E. Corcoran or Doug Stillwell. I.C. 35-50-2-9(b)(8). The Court accords this high weight.

The Court further finds that the State has proven beyond a reasonable doubt the aggravating circumstance that the Defendant committed the Murder in Count 4 by knowingly or intentionally killing the victim, Timothy G. Bricker, and the Defendant committed another Murder, killing James E. Corcoran or Doug Stillwell or Robert S. Turner. I.C. 35-50-2-9(b)(8). The Court accords this high weight.

The Defendant argued ten (10) mitigating circumstances at the original sentencing. Those mitigators, and the weight assigned by the trial Court, are set forth as follows:

The Court finds that the Defendant has proved the mitigating circumstance that he was under the influence of a mental or emotional disturbance at the time the murders were committed on July 26, 1997. The Court gives this mitigating circumstance medium weight. Dr. Engum's opinion at trial was consistent with the opinions of the Court appointed experts that the Defendant suffered from a

personality disorder, either paranoid personality disorder, or schizotypal personality disorder.

The Defendant argues that his capacity to appreciate the criminality of his conduct or to conform that conduct to the requirements of the law was substantially impaired as a result of mental disease or defect. The Defendant has submitted the opinions of Drs. Engum, Davis and Coons to support this contention. The Court notes that the original opinion of Dr. Engum does not support this mitigator. With the benefit of knowing the jury's recommendation, Dr. Engum submitted an addendum, to his report, reflecting a different analysis. The Court further notes that the opinion of Dr. Coons criticizes the other experts who examined the Defendant to determine his competency to stand trial and his sanity at the time of the offense. Dr. Coons states that "It is likely that the examiners did not pick up Mr. Corcoran's schizophrenic illness for a number of reasons: subtlety of symptoms, minimization of symptoms and evaluation early in the court of his illness." All opinions submitted by these doctors were based upon evaluations conducted in February 1999 and July 1999, well after the murders were committed.

The report of Dr. Spink, prepared in 1992, diagnosed the Defendant with "major depression in an incipient schizoid personality." Drs. Fawyer, Vodde, and Heinemann diagnosed personality disorder, although Dr. Heinemann indicated "a suspicion of possible psychosis." Later, Drs. Engum, Davis, and Coons evaluated the Defendant. Engum, Davis and Coons

all interviewed the Defendant knowing the jury's recommendation after the trial had concluded, and two years after the murders.

Under the law, and the facts of this case, the emotional or mental disturbance suffered by the Defendant do not affect his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law due to a mental disease or defect. The Court is not convinced that the Defendant's affliction meets the legal definition of mental disease or defect. The Court notes that even the well respected psychiatrists and psychologists opinions (not only those who examines the Defendant, but those contained in the literature submitted in the Sentencing Memorandums) can be viewed as ambiguous. The Court notes that all seven (7) Doctors offered differing opinions at to the Defendant and Dr. Spink admitted psychiatry is not an exact science and there are no black and white rules. The literature, and Dr. Engum's original opinion consider schizotypal or paranoid personality disorders to be maladaptive lifestyles. The facts reflect that the Defendant had the presence of mind to shield his young niece upstairs from the carnage he inflicted on innocent victims downstairs in the house on Bayer Avenue. He knew immediately what he had done, he know at the time what he was doing, and he knew that what he was doing was wrong. He immediately sought the assistance of the police. The Court is not persuaded that a psychiatric diagnosis of schizotypal personality disorder prevents the Defendant from knowing right from wrong and conforming his conduct to societal expectations.

The Defendant has also advanced the mitigator that his mental illness prevented his from competently assisting counsel in his defense. This stems from the Defendant's rejection of favorable plea recommendations from the State. The defense team had able assistance from outside sources to meet with the Defendant to persuade him to accept the State's offer. In spite of their efforts, the Defendant chose to exercise his Constitutional right to a trial by a jury of his peers and was unable to persuade the jury to recommend a sentence of life without parole. As the Court has found that the Defendant's mental or emotional disturbance did not affect his capacity to understand right from wrong, failed plea negotiations cannot be considered a mitigating circumstance.

The Defendant requests the Court to consider as a further mitigating circumstance the fact he cooperated fully with investigating authorities, reducing the potential for additional harm and furthering the States case against himself. The Court does believe this to be a mitigating circumstance. The Defendant did in fact cooperate with the police and gave a videotaped confession of his involvement. Art no time did he deceive or hinder the investigative process by making false or misleading statements. However, as he was the only adult left alive in the house, it would not nave been difficult for the police to investigate and determine who was responsible. The Court therefore assigns this mitigator a low weight.

An additional mitigator proposed by the Defendant is he has continually admitted his guilt at all stages of the legal process, including the case investigation (See paragraph above), the trial and his pre-sentence interview. The Court finds the Defendant has not admitted guilty. The Defendant demanded a trial by jury, which is an affirmation of a plea no not guilty. Has he admitted his guilt there would have been no trial. The fact he accepted responsibility for the murder before the jury was a trial strategy, designed to persuade the jury to recommend a sentence of life without parole. The Court refuses to accept this as a mitigating circumstance.

The Defendant claims his good behavior while incarcerated should be considered a mitigating circumstance. As good behavior is expected of incarcerated individuals, the Court does not consider this to be a mitigating circumstance.

Further, the Defendant claims that despite his well-documented mental condition, he had the forethought to protect his seven (7) year old niece from the confrontation that ensured. The Court does not find the Defendant's mental condition to be well-documented prior to the murders. The Defendant was examined in 1992. One report does not persuade the Court of a "well-documented" condition. In addition, the "confrontation that ensued" was at the Defendant's hand. It can hardly be said that shooting three unarmed men, lounging on couches watching TV, and chasing another unarmed man into a kitchen to shoot him is a "confrontation." This is not a mitigating circumstance.

The Defendant's eighth mitigator is his lack of a significant criminal history. The Defendant was a 1993 conviction for Criminal Mischief as a Class A misdemeanor. He has no juvenile adjudications. The Court assigns this mitigator a low weight.

Finally, the Defendant's remorse is advanced as a mitigating circumstance. The Defendant has indicated such remorse in a letter to the Court. The Court assigned this mitigator a low weight.

Pursuant to I.C. 35-50-2-9(k), and the December 6, 2000 Order from the Supreme Court, the trial Court has balanced the aggravating circumstances proved by the State against the mitigating circumstances proved by the Defendant. The trial Court, in balancing the proved aggravators and mitigators, emphasized to the Supreme Court that it only relied upon those proven statutory aggravators. The trial Court's remarks at the sentencing hearing, and the language in the original sentencing order explain why such high weight was given to the statutory aggravator of multiple murder, and further support the trial Court's personal conclusion that the sentence is appropriate punishment for this offender and these crimes.

The trial Court still finds the knowing and intentional murders of four (4) victims to be of high weight.

The Court, having evaluated and balanced all these circumstances, finds that the aggravating circumstances outweigh the mitigating circumstances. The Court against finds that the

mental or emotional disturbance suffered by the Defendant did not affect his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

The Court, having considered the jury's recommendation that the death penalty be imposed, now finds that such a sentence is supported by the facts and the evidence, and the character of the Defendant, and therefore orders that the Defendant be executed pursuant to Indiana law on a date to be determined by the Indiana Supreme Court upon review of this Revised Sentencing Order.

The Clerk of the Court is ordered to send a copy of this order to the Indiana Supreme Court Administrator's Office, the Superintendent of the Indiana Department of Corrections, the Allen County Public Defender's Office, the Allen County Prosecuting Attorney's Office and the Clerk of the Indiana Supreme Court, forthwith.

Dated: December 18, 2000

Frances C. Gull, Judge
Allen Superior Court
Allen County, Indiana

STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

IN THE ALLEN SUPERIOR COURT
FELONY DIVISION
CAUSE NO. 02D04-9707-CF-465

STATE OF INDIANA,	)
	)
Plaintiff	)
	)
v.	)
	)
JOSEPH EDWARD CORCORAN,	)
	)
Defendant	)

JUDGMENT OF CONVICTION AND
SENTENCING ORDER PURSUANT TO
I.C. 35-50-2-9

The Defendant, Joseph Edward Corcoran appears in person and by his Court appointed attorneys, John S. Nimmo and Mark Thoma. The State appears by Prosecuting Attorney Robert W. Gevers II and Deputy Prosecuting Attorney John Sullivan. The Defendant, having been found guilty following trial by jury, which jury recommended the death penalty, the Court conducts the sentencing hearing pursuant to I.C. 25-50-2-9.

The Court, having considered the written Pre-Sentence Investigation Report, the Defendant's Pre-

Sentencing Memorandum, the Defendant's Supplemental Sentencing Memorandum, and having heard and considered the evidence presented at both trial and the sentencing hearing, now finds:

1. The Defendant is guilty of Murder, a felony, in Count 1, the knowing or intentional killing of James E. Corcoran.
2. The Defendant is guilty of Murder, a felony, in Count 2, the knowing or intentional killing of Doug Stillwell.
3. The Defendant is guilty of Murder, a felony, in Count 3, the knowing or intentional killing of Robert S. Turner.
4. The Defendant is guilty of Murder, a felony, in Count 4, the knowing or intentional killing of Timothy G. Bricker.

The Court finds that he State has proven beyond a reasonable doubt the aggravating circumstance that the Defendant committed the Murder in Count 1 by knowingly or intentionally killing the victim, James E. Corcoran, and the Defendant committed another Murder, killing Doug Stillwell or Robert S. Turner or Timothy G. Bricker. I.C. 35-50-2-9(b)(8). The Court accords this high weight.

The Court further finds that the State has proven beyond a reasonable doubt the aggravating circumstance that the Defendant committed the Murder in Count 2 by knowingly or intentionally killing the victim Doug Stillwell, and the Defendant

committed another Murder, killing Robert S. Turner or Timothy G. Bricker or James E. Corcoran. I.C. 35-50-2-9(b)(8). The Court accords this high weight.

The Court further finds that the State has proven beyond a reasonable doubt the aggravating circumstances that the Defendant committed the Murder in Count 3 by knowingly or intentionally killing the victim Robert S. Turner, and the Defendant committed another Murder, killing Timothy G. Bricker or James E. Corcoran or Doug Stillwell. I.C. 35-50-2-9(b)(8). The Court accords this high weight.

The Court further finds that eh State has proven beyond a reasonable doubt the aggravating circumstance that the Defendant committed the Murder in Count 4 by knowingly or intentionally killing the victim, Timothy G. Bricker, and the Defendant committed another Murder, killing James E. Corcoran or Doug Stillwell or Robert S. Turner. I.C. 35-50-2-9(b)(8). The Court accords this high weight.

The Defendant has asked the Court to consider nine (9) statutory and non-statutory mitigating circumstances as follows:

1. The Defendant was under the influence of extreme mental or emotional disturbance when the murders were committed.
2. The Defendant's capacity to appreciate the criminality of his conduct or to conform that conduct to the

requirements of the law was substantially impaired as a result of mental disease or defect.

3. Due to his diagnosed mental illness, the Defendant was unable to competently assist in his defense.
4. The Defendant cooperated fully with investigating authorities, reducing the potential for additional harm and furthering the State's case against him.
5. The Defendant has continually admitted his guilt at all stages of the legal process, including the case investigation, the trial and his pre-sentence interview.
6. The Defendant has maintained good behavior while incarcerated in the Allen and Porter County jails. He has maintained this conduct for two (2) years while awaiting disposition of this case.
7. Despite his well-documented mental condition, the Defendant had enough forethought to protect his 7 year old niece from the confrontation that ensued.
8. The Defendant has no significant history of prior criminal conduct.
9. The Defendant is remorseful for his offense.
10. The Defendant's age.

The Court finds that the Defendant has proved the mitigating circumstance that he was under the

influence of a mental or emotional disturbance at the time the murders were committed on July 26, 1997. The Court gives this mitigating circumstance medium weight. Dr. Engum's opinion at trial was consistent with the opinions of the Court appointed experts that the Defendant suffered from a personality disorder, either paranoid personality disorder, or schizotypal personality disorder.

The Defendant argues that his capacity to appreciate the criminality of his conduct or to conform that conduct to the requirements of the law was substantially impaired as a result of mental disease or defect. The Defendant has submitted the opinions of Drs. Engum, Davis and Coons to support this contention. The Court notes that the original opinion of Dr. Engum does not support this mitigator. With the benefit of knowing the jury's recommendation, Dr. Engum submitted an addendum, to his report, reflecting a different analysis. The Court further notes that the opinion of Dr. Coons criticizes the other experts who examined the Defendant to determine his competency to stand trial and his sanity at the time of the offense. Dr. Coons states that "It is likely that the examiners did not pick up Mr. Corcoran's schizophrenic illness for a number of reasons: subtlety of symptoms, minimization of symptoms and evaluation early in the court of his illness." All opinions submitted by these doctors were based upon evaluations conducted in February 1999 and July 1999, well after the murders were committed.

The report of Dr. Spink, prepared in 1992, diagnosed the Defendant with "major depression in an incipient schizoid personality." Drs. Fawyer, Vodde, and Heinemann diagnosed personality disorder, although Dr. Heinemann indicated "a suspicion of possible psychosis." Later, Drs. Engum, Davis, and Coons evaluated the Defendant. Engum, Davis and Coons all interviewed the Defendant knowing the jury's recommendation after the trial had concluded, and two years after the murders.

Under the law, and the facts of this case, the emotional or mental disturbance suffered by the Defendant do not affect his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law due to a mental disease or defect. The Court is not convinced that the Defendant's affliction meets the legal definition of mental disease or defect. The Court notes that even the well respected psychiatrists and psychologists opinions (not only those who examines the Defendant, but those contained in the literature submitted in the Sentencing Memorandums) can be viewed as ambiguous. The Court notes that all seven (7) Doctors offered differing opinions at to the Defendant and Dr. Spink admitted psychiatry is not an exact science and there are no black and white rules. The literature, and Dr. Engum's original opinion consider schizotypal or paranoid personality disorders to be maladaptive lifestyles. The facts reflect that the Defendant had the presence of mind to shield his young niece upstairs from the carnage he inflicted on innocent victims downstairs in the house on Bayer Avenue. He knew immediately what

he had done, he know at the time what he was doing, and he knew that what he was doing was wrong. He immediately sought the assistance of the police. The Court is not persuaded that a psychiatric diagnosis of schizotypal personality disorder prevents the Defendant from knowing right from wrong and conforming his conduct to societal expectations.

The Defendant has also advanced the mitigator that his mental illness prevented his from competently assisting counsel in his defense. This stems from the Defendant's rejection of favorable plea recommendations from the State. The defense team had able assistance from outside sources to meet with the Defendant to persuade him to accept the State's offer. In spite of their efforts, the Defendant chose to exercise his Constitutional right to a trial by a jury of his peers and was unable to persuade the jury to recommend a sentence of life without parole. As the Court has found that the Defendant's mental or emotional disturbance did not affect his capacity to understand right from wrong, failed plea negotiations cannot be considered a mitigating circumstance.

The Defendant requests the Court to consider as a further mitigating circumstance the fact he cooperated fully with investigating authorities, reducing the potential for additional harm and furthering the States case against himself. The Court does believe this to be a mitigating circumstance. The Defendant did in fact cooperate with the police and gave a video-taped confession of his involvement. Art no time did he deceive or hinder

the investigative process by making false or misleading statements. However, as he was the only adult left alive in the house, it would not have been difficult for the police to investigate and determine who was responsible. The Court therefore assigns this mitigator a low weight.

An additional mitigator proposed by the Defendant is he has continually admitted his guilt at all stages of the legal process, including the case investigation (See paragraph above), the trial and his pre-sentence interview. The Court finds the Defendant has not admitted guilty. The Defendant demanded a trial by jury, which is an affirmation of a plea no not guilty. Has he admitted his guilt there would have been no trial. The fact he accepted responsibility for the murder before the jury was a trial strategy, designed to persuade the jury to recommend a sentence of life without parole. The Court refuses to accept this as a mitigating circumstance.

The Defendant claims his good behavior while incarcerated should be considered a mitigating circumstance. As good behavior is expected of incarcerated individuals, the Court does not consider this to be a mitigating circumstance.

Further, the Defendant claims that despite his well-documented mental condition, he had the forethought to protect his seven (7) year old niece from the confrontation that ensured. The Court does not find the Defendant's mental condition to be well-documented prior to the murders. The Defendant was examined in 1992. One report does not persuade

the Court of a "well-documented" condition. In addition, the "confrontation that ensued" was at the Defendant's hand. It can hardly be said that shooting three unarmed men, lounging on couches watching TV, and chasing another unarmed man into a kitchen to shoot him is a "confrontation." This is not a mitigating circumstance.

The Defendant's eighth mitigator is his lack of a significant criminal history. The Defendant was a 1993 conviction for Criminal Mischief as a Class A misdemeanor. He has no juvenile adjudications. The Court assigns this mitigator a low weight.

Finally, the Defendant's remorse is advanced as a mitigating circumstance. The Defendant has indicated such remorse in a letter to the Court. The Court assigned this mitigator a low weight.

Pursuant to I.C. 35-50-2-9(k) the Court has balanced the aggravating circumstances proved by the State against the mitigating circumstance proved by the Defendant. The Court finds that the knowing and intentional murders of four (4) innocent victims to be particularly heinous crimes. The Court weighs this aggravating circumstance very high. The Court, having evaluated and balanced these circumstances finds that the aggravating circumstance outweigh the mitigating circumstances. The Court again finds that the mental or emotional disturbance suffered by the Defendant did not affect his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

The Court, having considered the jury's recommendation that the death penalty be imposed now finds that such a sentence is supported by the facts and the evidence, and the character of the Defendant, and therefore orders that the Defendant be executed pursuant to Indiana law not later than August 25, 2000.

Defendant is advised of this right to appeal his conviction herein. The Court finds that Defendant is indigent and entitled to appeal at public expense. Pursuant to Criminal Rule 24, the Court will enter an order appointing qualified appellate counsel on or before August 30, 1999. Pursuant to I.C. 35-50-2-9(j), this sentence is subject to automatic review by the Indiana Supreme Court. The Court notes that the Defendant indicates his desire to waive all appeals, and refers same to the Indiana Supreme Court for determination.

The Court Reporters and the Clerk of this Court are ordered to begin the immediate preparation of the Record of Proceedings in this matter.

The Clerk of the Court is further ordered to send a copy of this order to the Indiana Supreme Court Administrator's Office, the Superintendent of the Indiana Department of Corrections, the Allen County Public Defender's Office, and the Allen Count Prosecuting Attorney's Office forthwith.

Date: August 26, 1999

Frances C. Gull, Judge
Allen Superior Court

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 14, 2010

Before

WILLIAM J. BAUER, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

Nos. 07-2093 and 07-2182

JOSEPH E. CORCORAN,
Petitioner-Appellee/
Cross-Appellant,

v.

MARK LEVENHAGEN,
Superintendent,
Respondent-Appellant/
Cross-Appellee.

Appeals from the United States District
Court for the Northern District of
Indiana, South Bend Division

No. 05 C 389

Allen Sharp,
Judge.

ORDER

Upon consideration of the petition for rehearing and rehearing en banc, filed by respondent-appellant/cross-appellee on February 24, 2010, and the answer filed by petitioner-appellee/cross-appellant on March 25, 2010, no judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny the petition for rehearing. It is, therefore, **ORDERED** that the petition for rehearing and rehearing *en banc* is **DENIED**.

IT IS FURTHER ORDERED that the court's opinion dated January 27, 2010, is amended as follows:

> On page 5 of the slip opinion, second full paragraph, line 12, the phrase "two obviously unreasonable fact determinations" shall be replaced with "an obviously unreasonable fact determination".
>
> On page 7 of the slip opinion, the sentence at the end of the paragraph at the top – "But the state trial court must reconsider its sentencing determination, . . ." – shall be appended with:
>
> > This will cure the state trial court's "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1). (It will also prevent noncompliance with Indiana law. Petitioner contended that, under the circumstances of this case, noncompliance with state law also

violates the federal Constitution and thus warrants him relief under 28 U.S.C. § 2254(d)(2). Respondent has not advanced any contrary argument based on *Wainwright v. Goode*, 464 U.S. 78 (1983), or any similar decision.)

On page 7 of the slip opinion, the first full paragraph, through all of page 9, shall be deleted and replaced with:

For completeness, we note that there were no other prejudicial errors in the sentencing process. Corcoran also claimed that the Indiana trial court failed to consider six of the ten mitigating circumstances Corcoran proffered: (1) his age; (2) his substantially impaired ability to appreciate the criminality of his conduct or to conform that conduct with the requirements of the law; (3) his inability to competently assist in his defense; (4) his forethought to protect his seven year old niece during the murders; (5) his good behavior in jail before sentencing; and (6) his admission of guilt "at all stages of the legal process" including the trial. But when the trial court first sentenced Corcoran, it explicitly discussed and rejected these mitigators as either false or nonmitigatory. Trial Tr. At 2915; *State of Indiana v. Corcoran*, No. 02D04-9707-CF-465, at 3 6 (Ind. Super. Ct. Aug. 26, 1999). When the Indiana Supreme Court later advised it to clarify only whether it had used non-statutory aggravators, it is

unsurprising that the trial court declined to reiterate its analysis of these mitigators it had previously rejected.

The Indiana Supreme Court made an erroneous finding of fact, that the trial court "analyzed" and "rejected" Corcoran's age in its sentencing order, *Corcoran*, 744 N.E.2d at 500, because the sentencing order makes no mention of Corcoran's age except to note that Corcoran proffered it as a mitigator. But that error was harmless, as the trial court considered Corcoran's age when it orally pronounced sentence upon him. Trial Tr. At 2915.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FINAL JUDGMENT

January 27, 2010

WILLIAM J. BAUER, Circuit Judge
ANN CLAIRE WILLIAMS, Circuit Judge
DIANE S. SYKES, Circuit Judge

JOSEPH E. CORCORAN,
Petitioner - Appellee
Cross – Appellant

v.

MARK E. LEVENHAGEN,
Respondent - Appellant
Cross – Appellee

Nos.: 07-2093 & 07-2182

Originating Case Information:
District Court No: 3:05-cv-00389-AS-CAN
Northern District of Indiana, South Bend Division
District Judge Allen Sharp

The district court's conditional grant of Corcoran's petition for a writ of habeas corpus is AFFIRMED, but we modify its order to grant the writ unless within 120 days the state court holds a new sentencing hearing in accordance with the opinion..

The above is in accordance with the decision of this court entered on this date.

OPPOSITION BRIEF

No. 10-91

In The Supreme Court Of The United States

WILLIAM WILSON, Warden, *Petitioner*,

v.

JOSEPH E. CORCORAN, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Should this Court grant certioran to consider a question based on arguments not raised in the district court, the Court of Appeals, or previously before this Court?

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No. 10-91

In The Supreme Court Of The United States

WILLIAM WILSON, Warden, *Petitioner,*

v.

JOSEPH E. CORCORAN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Joseph E. Corcoran, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the United States Court of Appeals for the Seventh Circuit's opinion and amended opinion in this case. The Seventh Circuit's unanimous opinion is reported as *Corcoran v. Levenhagen*, 593 F.3d 547 (7th Cir. 2010) (1a-15a), and was amended via the rehearing process in unreported fashion. *Corcoran v. Levenhagen*, 2010 U.S. App. LEXIS 7658 (7th Cir. Apr. 14, 2010) (143a-146a). While the Panel amended the opinion, Petitioner's *en banc* request was denied. *See id.* 144a ("...no judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny the petition for rehearing.")

The Seventh Circuit conducted proceedings consistent with and in response to the Opinion of this Court remanding the case for further proceedings. *Corcoran v. Levenhagen*, 558

U.S. __, 130 S.Ct. 8 (2009) (16a-17a). Specifically, this Court noted that claims remained to be addressed:

> An Indiana jury convicted Joseph Corcoran of four counts of murder. Corcoran was sentenced to death. After Corcoran's challenges to his sentence in the Indiana courts failed, he sought federal habeas relief. Corcoran argued in his federal habeas petition that **(1) the Indiana trial court committed various errors at the sentencing phase;** (2) his sentence violated the Sixth Amendment; (3) Indiana's capital sentencing statute was unconstitutional; (4) the prosecution committed misconduct at sentencing, and (5) he should not be executed because he suffers from a mental illness. See *Corcoran* v. *Buss*, 483 F. Supp. 2d 709, 719, 726 (ND Ind. 2007). The District Court granted habeas relief on Corcoran's claim of a Sixth Amendment violation, and ordered the state courts to resentence Corcoran to a penalty other than death. *Id.*, at 725-726. The District Court did not address Corcoran's other arguments relating to his sentence, noting that they were "rendered moot" by the order that Corcoran be resentenced because of the Sixth Amendment violation. *Id.*, at 734.

Corcoran, 558 U.S. at __, 130 S.Ct. at 9 (emphasis added) (16a). This Court specifically noted that the Warden, Petitioner herein, addressed the frivolity of the merits in the brief in opposition. *Id.* ("In its brief in opposition, the State argues that Corcoran's claims were waived, and that they were in any event frivolous, so that a remand would be wasteful. Brief in Opposition 9-10.") (17a).

This Court remanded to the Seventh Circuit for further proceedings and a consideration of the merits. The Rules of the Seventh Circuit required the filing of a Rule 54 statement upon the remand from this Court. The Seventh Circuit notified the parties of this requirement and the due date for such a statement. *See Corcoran v. Levenhagen* Docket 11/23/09 Letter to Parties. In his Rule 54 Statement to the Seventh Circuit, Respondent Corcoran argued that the most appropriate procedure would be a remand to the district court for a consideration of the merits.

In short, Respondent Corcoran's previous victory should not have deprived him of a district court review on his other claims.[1] **Petitioner failed to even file a Rule 54 statement.**

The Seventh Circuit exercised its discretion to address the merits as permitted by this Court. *See Corcoran*, 593 F.3d at 550 (3a-5a).

STATEMENT OF THE CASE

Petitioner paints an incomplete picture of the record below and mischaracterizes that which confronted the Seventh Circuit. As described by the Seventh Circuit, the record reflects the factual findings of the state court simply were not entitled to deference:

> **But this finding of fact, that the trial court did not consider non-statutory aggravators in the balancing process used to determine Corcoran's death sentence, was obviously in error**, if we are to believe what the trial court added next. Specifically, it stated that its "remarks at the sentencing hearing, and the language in the original sentencing order,"--both regarding the use of the three non-statutory aggravators about which Corcoran complained--"*explain why such high weight was given to the statutory* aggravator of multiple murder." *See id.* (emphasis added). In other words, the court added weight to a statutory aggravator based on the non-statutory aggravators. And factor weighting is part of factor "balancing," the very process in which the trial court disclaimed reliance on non-statutory aggravators. So unlike the Indiana Supreme Court, we are far from "satisfied that the trial court has relied only on aggravators listed in Indiana Code § 35-50-2-9(b)." *Corcoran v. State*, 774 N.E.2d 495, 499 (Ind. 2002). Indeed, we find this an "unreasonable determination of the facts" in light of the trial court's proceedings, thus warranting habeas relief. 28 U.S.C. § 2254.
>
> Nothing in this opinion prevents Indiana from adopting a rule, *contra Bivins*, 642 N.E.2d at 955-56, permitting the use of non-statutory aggravators in the death sentence selection process. *See Zant v. Stephens*, 462 U.S. 862, 878, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) (permitting their use under federal law). But the state trial court must reconsider its sentencing determination, and **this time may not find, contrary to logic, that it both did and did not consider non-statutory aggravating circumstances when it sentenced Corcoran to death.**

Corcoran, 593 F.3d at 551-552 (emphasis added) (6a-7a). The record establishes that the trial court reweighed the improper non-statutory aggravating circumstances. *See* Supp. R. 48-49 (the

[1] The Seventh Circuit improperly held that Respondent Corcoran had waived these issues in failing to pursue an appeal when the district court did not address the merits on the basis of mootness. *Corcoran*, at 550. There has been no waiver and Respondent followed the then existing process.

trial court refers to the earlier improper statements as "further support for the trial court's personal conclusion that the sentence is appropriate punishment for this offender and their crimes.")

In sum, the record overwhelmingly supports the Seventh Circuit's holding, and clearly and convincingly rebuts that of the state court's treatment of the issue. Simply, the Seventh Circuit found that the record overcame the presumption that is usually accorded a state court determination. This is not a controversial proposition and Petitioner improperly describes this uncontroversial act as a usurpation of state law, when no such thing occurred.

Petitioner correctly notes that the Seventh Circuit decided the instant matter after the remand without full briefing or argument. *See* Petition p. 11. However, this is not a complete recounting of the procedural history. The Rules of the Seventh Circuit required the filing of a Rule 54 statement upon the remand from this Court. The Seventh Circuit notified the parties of this requirement and the due date for such a statement. *See Corcoran v. Levenhagen* Docket 11/23/09 Letter to Parties. Respondent filed in accordance with the Rule and the Seventh Circuit's directive. **Petitioner filed nothing**. This failure, or waiver, is a significant omission in the statement of the case.

While Petitioner states what occurred previously before this Court, Petitioner omits salient procedural facts. In Petitioner Warden's previous brief in opposition to this Court,

> In any event, Corcoran's claims are frivolous and remand would not be an appropriate use of judicial resources... The first of these claims argues that the trial court considered non-statutory aggravating circumstances and failed to consider mitigating circumstances. As for the allegation regarding non-statutory aggravating circumstances, it is simply impossible to infer from the sentencing statement that any such circumstances were considered as the trial court's order was emphatic and unambiguous in this regard.

Brief in Opposition p. 10 (citation omitted). Petitioner failed to raise the state law basis now being featured. Rather, Petitioner contested the merits and the lack of ambiguity in the record, and invited a review of the record.[2] *Id.* ("...unambiguous in this regard.").

ARGUMENTS AS TO WHY CERTIORARI SHOULD BE DENIED

I. PETITIONER'S QUESTIONS PRESENTED COULD HAVE BEEN ARGUED OR PRESENTED TO THIS COURT PREVIOSULY, BUT WERE NOT.

This Court decided Respondent Corcoran's case last term. *See Corcoran*, 558 U.S. __, 130 S.Ct. 8 (16a-17a). In opposition to Respondent Corcoran's then petition for writ of certiorari, Petitioner herein contested the merits of Respondent Corcoran's claims and even then did not apprise this Court of the current issue. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 383 (1989) (failure to argue in brief in opposition is a waiver of argument); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985) (failure to argue in brief in opposition is a waiver of argument). In his Brief in Opposition to Corcoran's ultimately successful Petition for Writ of Certiorari, Petitioner Warden herein addressed the merits of the claim and did not allege a state law basis. Brief in Opposition p. 10.

This Court specifically recognized that one of Respondent Corcoran's claims related to constitutional irregularities in the sentencing process. *Corcoran*, 558 U.S. at __, 130 S.Ct. at 9 ("Corcoran argued in his federal habeas petition that: (1) the Indiana trial court committed various errors at the sentencing phase...") (16a). This Court also specifically recognized that the Petitioner herein contested the merits of the claim. *Id.* ("In its brief in opposition, the State argues that Corcoran's claims were waived, and that they were in any event frivolous, so that a remand would be wasteful. Brief in Opposition 9-10.") (17a).

---

[2] Petitioner now also inconsistently asserts the record is ambiguous. *See* Petition pp. 14, 16, 20, 21. There has been no change in the record, only a change in Petitioner's status.

A party cannot and should not be rewarded for withholding arguments until filing a subsequent cert petition with this Court. Petitioner is attempting to do just that, and revitalize arguments that could and should have been made previously to this Court, but were not. Given Petitioner's procedural shortcomings and impediments, this Court should not grant cert herein

II. PETITIONER'S QUESTIONS PRESENTED HAVE NEVER BEEN ARGUED OR PRESENTED TO THE COURTS BELOW.

A party must present arguments to the lower courts in order for an issue to properly matriculate to this Court. A party cannot and should not be rewarded for withholding arguments until filing a cert petition with this Court. Petitioner has done just that, attempting to play "Monday morning quarterback," when utterly failing to apprise the lower courts of the arguments now being presented.

Petitioner erroneously argues that the unanimous Seventh Circuit decision upon which no judge requested a vote for rehearing *en banc* involved solely a matter of state law.[3] Petitioner never argued a state law basis in the proceedings below, until belatedly in the *en banc* request. *See City of Canton, Ohio v. Harris*, 489 U.S. at 383 (noting the non-jurisdictional basis to deny cert on the failure to argue below, but waived by respondent for failure to timely raise in brief in opposition); *Oklahoma City v. Tuttle*, 471 U.S. at 815-816 (same).

In his return of writ before the District Court, Petitioner did not assert that the claims were solely state law issues. Rather, Petitioner argued that the "state supreme court's judgment is [not] in any way inconsistent with applicable United States Supreme Court precedent. Therefore, Corcoran's claims alleging deficiencies in the record are without merit pursuant to 28 U.S.C. 2254(d)." ECF R. 33 p. 16 (Memorandum in Support of Return of Writ). Petitioner invited the District Court to apply 2254(d). In stark contrast, Petitioner now complains about the

[3] For the reasons more fully expressed herein, that simply is not true. *See Parker v. Dugger*, 498 U.S. 308 (1991).

Seventh Circuit's application of the very process that Petitioner requested occur. A party should not be allowed to switch positions within the same litigation. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

In short, Respondent failed to timely assert a state law basis before the District Court. *See Lee v. Kemna*, 534 U.S. 362, 376 n. 8 (2002) (state's assertion of procedural default deemed waived because not raised in appellate court brief or in brief in opposition to cert); *Canaan v. McBride*, 395 F.3d 376, 381-82 (7th Cir. 2005) (finds a state's waiver of procedural defenses for failing to raise it before state court or federal court).

When Respondent Corcoran raised in his rehearing request from *Corcoran v. Levenhagen*, 551 F.3d 703 (2008), the Seventh Circuit's failure to consider the mooted claims, Petitioner Warden addressed the merits of the claim and did not allege a state law basis. Response to Rehearing Request pp. 6-7. Specifically, Petitioner Warden:

> Regardless, these claims do not warrant further delay by remand to the district court. The Indiana Supreme Court correctly rejected this argument on direct appeal after remanding to the trial court. *Corcoran v. State*, 774 N.E. 2d 495, 498 (Ind. 2002). As the Indiana Supreme Court correctly observed, the trial court's sentencing order after remand was clear that the trial court relied only upon the multiple murder aggravator in imposing Corcoran's death sentence of death. *Id.* ..Given these indisputable facts, it is unclear how Corcoran arrives at his contention that the trial court's statement regarding the appropriateness of his sentence violates the Eighth and Fourteenth Amendments.

At no point did Petitioner apprise the Seventh Circuit that the claims relate solely to a state law basis and therefore were not cognizable in federal habeas.

Further and most recently, Petitioner failed to file a Rule 54 statement contesting the Ground's upon which relief were granted as presenting state law issues. Having failed to utilize the opportunity to present that argument to the Seventh Circuit (as ordered by the Seventh Circuit), Petitioner should not be allowed to resuscitate it now in this discretionary matter. *See*

Kemna, 534 U.S. at 376 n. 8 (state's assertion of procedural default deemed waived because not raised in appellate court brief or in brief in opposition to cert).

Petitioner never alleged below the bases now being presented to this Court. Petitioner waived this argument by failing to assert to the District Court and the Seventh Circuit on multiple occasions, in opposition to Corcoran's rehearing request and upon remand in by failing to file the Rule 54 remand statement.[4] Indeed, the Seventh Circuit specifically found a waiver by amending the opinion with "Respondent has not advanced any contrary argument based on *Wainwright v. Goode*, 464 U.S. 78, 104 S. Ct. 378, 78 L. Ed. 2d 187 (1983), or any similar decision." *Corcoran*, 2010 U.S. App. LEXIS 7658 at *2 (145a).

Because Petitioner **never raised** such challenges until the *en banc* process, neither the Seventh Circuit nor the district court decided the questions now presented by Petitioner. A party should not be rewarded for sandbagging arguments with the hope of presenting a successful cert request to this Court. This Court has found that a Petitioner has a "burden of showing that the issue was properly presented" to the court being reviewed. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). As in *Adams* (where the defect was discovered after cert was granted and cert was dismissed as improvidently granted), Petitioner herein cannot demonstrate that the issue now being presented was properly presented to the Court below because he never made that argument.

Given Petitioner's multiple waivers, this Court should not grant cert herein to raise an issue never presented or considered below due to Petitioner's failures to brief this aspect of the merits. This is particularly true when the unanimous Seventh Circuit specifically noted that "Respondent has not advanced any contrary argument based on *Wainwright v. Goode*, 464 U.S.

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[4] As previously noted, Petitioner also failed to argue this in his brief in opposition to this Court prior to this Court's disposition in *Corcoran*, 558 U.S. __, 130 S.Ct. 8.

78, 104 S. Ct. 378, 78 L. Ed. 2d 187 (1983), or any similar decision." *Corcoran*, 2010 U.S. App. LEXIS 7658 at *2 (145a).

Petitioner cannot establish that the questions presented were properly presented to any of the courts below, and in one instance failed to file a brief between the remand from this Court and the Seventh Circuit's ruling. When Petitioner untimely sought to assert them in the *en banc* request, no judge called a vote and the Seventh Circuit amended its opinion to highlight the waiver. Therefore, this case is not an appropriate candidate for cert. *See Adams*.

Alternatively, if this Court is inclined to forgive the multiple waivers, this Court should remand the matter to the District Court. The District Court should have the opportunity to pass on the issue and allow it to matriculate to this Court in the manner normally envisioned by the federal process.

III. PETITIONER CONCEDES THAT A FEDERAL CONSTITUTIONAL CLAIM EXISTS.

In his petition, Petitioner notes that a state's failure to comply with its statute can rise to the level of a constitutional violation. Petition p 17 *citing to Goode* and *Barclay*. This concession that it is not simply a matter of state law confirms that the unanimous Seventh Circuit properly applied 2254 (d) in making a determination whether the record supported the state court's conclusions, and when it did not, whether Respondent Corcoran was entitled to relief. Petitioner cannot in one breathe recognize that a constitutional violation may exist but then in the next argue that there can be no federal review of that question. Because Petitioner concedes that a constitutional violation may exist, the writ should be denied.

IV. PETITIONER'S CONFLICT IS ILLUSORY, IF IT DOES EXIST, IT IS STALE AND UNDEVELOPED, AND WAS INVITED BY PETITIONER.

The unanimous Seventh Circuit properly applied this Court's authority. Contrary to Petitioner's assertions, there is no conflict between the judgment below and the decision of any other federal court of appeals. *See* Sup.Ct. R. 10(a). Petitioner can only cite two cases covering the last twenty-seven years to claim that the judgment below conflicts with judgments of other lower courts. All of the cases cited as supporting a purported conflict rely on different factual records under distinct death penalty statutes.

In this regard, Petitioner attempts to manufacture her questions presented and thereby create a conflict which is illusory. The cases cited by Petitioner, safely characterized as few and far between, presented distinct factual records under distinct death penalty statutes.

For instance, in *Fox v. Coyle*, 271 F.3d 658, 669 (6th Cir. 2001), the Sixth Circuit considered a death penalty statute that specifically allowed the consideration of non-statutory circumstances in the weighting process. Thus, as a factual matter, the Sixth Circuit considered an appropriate consideration of evidence under a state's criteria. However and in conformity with the Seventh Circuit's actions, the Sixth Circuit did note that a departure from the statute would raise a constitutional violation by describing that "no constitutional claim is stated where a state's highest court either concludes that no extra-statutory factors were considered at the trial level...The critical question in this case is thus whether the Ohio courts considered extra-statutory aggravating factors." *Id.* at 667. Engaging in this analysis (again the same as that conducted by the Seventh Circuit), the Sixth Circuit concluded Mr. Fox simply lost on the factual record in his case.

There exists no genuine conflict. It cannot be said with confidence that different courts have decided the same legal issue in opposite ways, because there are dissimilar facts and

statutory processes involved. As former Justice Breyer explained that "attorneys often present cases that involve not actual divides among the lower courts, but merely different verbal formulations of the same underlying legal rule. And we are not particularly interested in ironing out minor linguistic discrepancies among lower courts because those discrepancies are not outcome determinative." Justice Breyer, *Reflections on the Role of Appellate Courts: A view from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006).

Additionally, while Respondent does not agree there are conflicts, the alleged conflict hardly represents an "important" issue upon which there is a divisive split of authority in the circuits requiring this Court to intervene. Rather, the age of the authority 26 years for one and almost 10 for the other, establish that this is not a live controversy currently percolating in the circuits. Assuming these cases are in conflict, it is not developed enough (only 3 cases in 26 years) to merit exercising this Court's cert discretion. *See McCray v. New York*, 461 U.S. 961, 963 (1983); *Gilliard v. Mississippi*, 464 U.S. 867 (1983).

Finally, Petitioner did not argue this aspect of the merits in any of the courts below in spite of numerous opportunities. Therefore, Petitioner's silence invited this conflict, to the extent there is any conflict at all.

Therefore, the Court must deny the cert request.

V. SETTING ASIDE PETITIONER'S NUMEROUS WAIVERS, THE SEVENTH CIRCUIT COMMITTED NO ERROR AND THIS COURT DOES NOT NEED TO REVIEW THE UNANIMOUS SEVENTH CIRCUIT'S APPLICATION OF SETTLED LEGAL PRINCIPLES TO THE UNIQUE FACTS OF RESPONDENT'S CASE.

The Seventh Circuit opinion merely applied this Court's authority, in the context of AEDPA, to the record in Respondent's case. In so doing, the unanimous Seventh Circuit identified and applied the required and correct Supreme Court principles from *Zant v. Stephens*,

462 U.S. 862 (1983). *Corcoran*, 593 F.3d at 551. Applying these principles, the unanimous Seventh Circuit looked to Respondent's sentencing calculus and determined that the factual record rebutted the findings of the state courts.

In sum, Petitioner's cert request herein should be rejected because at its core it consists of (at best) a misapplication of a properly stated rule of law. *Ross v. Moffett*, 417 U.S. 600, 616-17 (1974) (purpose of cert is not to correct perceived errors). No member of the Seventh Circuit called for a vote on this illusory state law bases asserted now and belatedly in the *en banc* process.

Petitioner merely quibbles over the factual determination of the unanimous Seventh Circuit. This Court does not ordinarily grant review of such "fact bound" cases. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.") Instead, Sup. Ct. R. 10 specifically provides that "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual finding." *See Kyles v. Whitley*, 514 U.S. 419, 456 (1995)(Scalia, J., dissenting) ("What we have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err – precisely the type of case in we are *most* inclined to deny certiorari."). Petitioner never argued in his cert petition that the Seventh Circuit's factual findings were flawed, but only challenges the Seventh Circuit's ability to address the merits at all.[5]

Petitioner overstates the impact of *Wainwright v. Goode*, 464 U.S. 78 (1983) (per curiam). Initially, *Goode* itself conducted the very analysis of the state court record to which Petitioner now states the unanimous Seventh Circuit erred in conducting and should be prohibited from conducting. Specifically, this Court in *Goode* reviewed the state court record

[5] Again, this is a flip-flop from the district court argument and the argument in the brief in opposition to cert in this Court that specifically invited application of 2254(d).

and made a determination that the record did not rebut the state court's finding that the non-statutory aggravators were improperly considered. *Id.* at 84-85. The unanimous Seventh Circuit cannot be faulted for following the dictates of *Goode*.

Further, Petitioner overstates *Goode's* reach and utterly ignores this Court's subsequent authority applying those same principles. Significant and subsequent non-per curiam authority has addressed the federal aspects of Corcoran's claim. *See e.g. Parker v. Dugger*, 498 U.S. 308 (1991), *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Sochor v. Florida*, 504 U.S. 527 (1992); *Clemons v. Mississippi*, 494 U.S. 738 (1990). While not overruling the precise circumstances of *Goode*, those cases have effectively defined and redefined *Goode's* circumstances to the uncontroversial proposition that when a record does not rebut a state court's finding, habeas relief cannot be obtained.[6]

The unanimous Seventh Circuit properly held that the Indiana Supreme Court's finding that the trial court did not consider non-statutory aggravators is not fairly supported by the record. The record establishes that the trial court reweighed the improper non-statutory aggravating circumstances. Supp. R. 48-49 (the trial court refers to the earlier improper statements as "further support for the trial court's personal conclusion that the sentence is appropriate punishment for this offender and their crimes."). After reviewing the totality of the record, the Seventh Circuit was correct in holding in these circumstances that:

> ...the court added weight to a statutory aggravator based on the non-statutory aggravators. And factor weighting is part of factor "balancing," the very process in which the trial court disclaimed reliance on non-statutory aggravators. So

[6] Those cases also recognize that an independent review and reweighing can cure the alleged error. However, there has been no independent assessment in Respondent's case. The Indiana Supreme Court assessed Corcoran's case via the sentencing entry, not independently of such. *See State v. Corcoran*, 774 N.E.2d 495, 501-502 (Ind. 2002) (applying a "manifestly unreasonable" standard the court concluded it was "satisfied that the trial court's decision" was appropriate). The Indiana Supreme Court did not independently assess this evidence, and rather, applied a reasonableness test to the trial court's determination. A determination based on non-statutory aggravators (for a second time) which Respondent Corcoran had no opportunity to challenge. *See Gardner v. Florida*, 430 U.S. 349 (1977).

> unlike the Indiana Supreme Court, we are far from "satisfied that the trial court has relied only on aggravators listed in Indiana Code § 35-50-2-9(b)." *Corcoran v. State*, 774 N.E.2d 495, 499 (Ind. 2002). Indeed, we find this an "unreasonable determination of the facts" in light of the trial court's proceedings, thus warranting habeas relief. 28 U.S.C. § 2254.

Corcoran, 593 F.3d at 551.

Thus, pursuant to *Parker*, 498 U.S. at 320 and *Goode*, 464 U.S. at 83-85, the Indiana Supreme Court's ruling is an instance of a determination of fact not fully and fairly made by the court. Because the state court record clearly contradicted the Indiana Supreme Court's finding, Petitioner satisfies 2254(d)(2). *See Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (state court assumptions incorrect therefore (d)(2) and (e)(1) does not constrain Court's review).

There is no dispute that it would have been a violation of federal constitutional principles if the trial court considered non-statutory aggravators in support of Petitioner's death sentence. Indiana was a weighing state (*see Hough v. Anderson*, 272 F.3d 878, 906 (7th Cir. 2001)); and thus, reliance on such circumstances was improper pursuant to *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) and *Sochor v. Florida*, 504 U.S. 527, 532 (1992). Thus, Petitioner's request boils down to a request for error correction. Under the unique and unlikely to recur circumstances of this case, this is an inadequate basis for the exercise of this Court's certiorari jurisdiction. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 250 (1969).

In sum, in seeking certiorari, Petitioner has misstated and mischaracterized the legal basis of the unanimous Seventh Circuit opinion. It is not simply a state legal issue (as Petitioner conceded), but an application of this Court's death penalty jurisprudence to a distinct factual record. Given this clear mischaracterization, Petitioner is thus asking this Court to review an issue that is not even presented by the judgment below (again in large measure due to Petitioner's failure to raise the state law bases until the *en banc* process). Additionally, the

petition should also be denied because the judgment below correctly found the record to rebut the factual findings of the state court, and thereby a constitutional violation. Because the unanimous Seventh Circuit's conclusion applied settled principles to the unique record of Respondent's case, certiorari should be denied. *See also* Sup. Ct. R. 10.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

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No. 10-91

In The Supreme Court Of The United States

WILLIAM WILSON, Warden, *Petitioner,*

v.

JOSEPH E. CORCORAN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that three copies of the enclosed Respondent's Motion to Proceed In Forma Pauperis and Brief in Opposition were served via first-class U.S. mail, postage prepaid, on this 6th day of August, 2010 upon:

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All persons required to be served have been served.

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REPLY BRIEF

Supreme Court, U.S.
FILED
SEP 15 2010
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No. 10-91

IN THE
Supreme Court of the United States

WILLIAM WILSON,
Superintendent, Indiana State Prison,
Petitioner,

v.

JOSEPH EDWARD CORCORAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

The decision of the court of appeals warrants this Court's review because it irreconcilably conflicts with *Wainwright v. Goode*, 464 U.S. 78 (1983) (per curiam), and exceeds a federal habeas court's jurisdiction by "correcting" a state supreme court's application of state law. Indeed, not even Respondent Corcoran tries to justify the court of appeals' broad expansion of habeas jurisdiction. At bottom, Corcoran's defense on the merits of his claim affirms the crux of Petitioner's argument: no Supreme Court precedent clearly establishes that consideration of non-statutory aggravating circumstances during capital sentencing violates the Constitution.

Moreover, Corcoran's primary focus, his assertion of a non-existent waiver, is equally devoid of support in law or fact. Corcoran asserts that Petitioner has forfeited any argument that the court of appeals could not exceed its well-defined jurisdiction. Not only is such an objection to subject-matter jurisdiction not waiveable, the issue arose for the first time when the court of appeals decided the matter on its own without giving the parties an opportunity to brief the merits. Not even Corcoran invited the court of appeals to adopt such a sweeping view of its jurisdiction, and Petitioner objected to it at the first available opportunity. A lower court's judgment should not evade further review merely because that court constructed—on its own and for the first time—an alternative theory of jurisdiction. The Court should grant the petition and reverse the judgment of the court of appeals.

I. The State preserved the issues presented

The State preserved the questions presented by the petition, and this case is a proper vehicle in which to decide them. First, the court of appeals' error here is one of subject-matter jurisdiction and cannot be waived. *United States v. Cotton*, 535 U.S. 625, 630 (2002). Second, the State has always maintained that Corcoran's arguments pertaining to the use of non-statutory aggravating circumstances failed to assert federal habeas claims. The precise manifestation of that deficiency only crystallized for the first time following the decision below when the court of appeals agreed that Corcoran's claims lacked basis in federal law but granted relief in order to correct a perceived error of Indiana law. Pet. App. 7a, 144a-145a. And in any event the Seventh Circuit ultimately addressed the State's jurisdictional argument squarely, which conclusively refutes any assertion of waiver.

1. The State has consistently maintained in the courts below that Corcoran's non-statutory aggravating circumstance claim has no federal law basis, let alone basis in the clearly-established precedent of this Court as required by 28 U.S.C. § 2254(d). As discussed in the petition, the State's argument in the district court was that Corcoran had failed to make out a violation of federal law by the Indiana courts. Pet. 23-24. Implicit in that argument is that any errors by the Indiana courts were errors of state law only, and were thus outside the purview of a federal court's habeas jurisdiction. Accordingly, the State's jurisdictional defense has been part of the case all along.

2. The State did not waive any arguments in its brief opposing Corcoran's petition for a writ of certiorari last term. In his prior petition, Corcoran's question presented was a procedural one: should the court of appeals have ignored all of his remaining claims that the district court had found moot in light of its grant of relief that would require a new trial. Petition for Writ of Certiorari at 23-25, *Corcoran v. Levenhagen*, 130 S. Ct. 8 (2009) (per curiam) (No. 08-10495) (2009 WL 3375035). The State briefly responded that Corcoran's additional, unadjudicated claims were both waived and—with regard to Corcoran's non-statutory aggravating circumstance claim—frivolous insofar as the Indiana Supreme Court found as a factual matter that the trial court did not consider improper non-statutory aggravating circumstances. Brief in Opposition at 9-10, *Corcoran*, 130 S. Ct. 8 (No. 08-10495) (2009 WL 3440019).

The Court granted the petition and remanded the case for review of Corcoran's unaddressed claims, but did not purport to consider their merits. *Corcoran*, 130 S. Ct. at 9. The Court left for the Seventh Circuit the job of considering all arguments for and against relief in the first instance, just as Corcoran had requested. *Id.*

Under such circumstances, there would be little point in deeming the State to have waived defenses to Corcoran's claims not asserted in the brief in opposition. Regardless of the pleadings in this Court, the Seventh Circuit had a full opportunity to consider all defenses; there can be no suggestion that the State sought to sandbag the lower court.

The waiver cases cited by Corcoran addressed circumstances where respondents failed to assert defenses in opposition to certiorari, but then raised them on the merits in *this* Court after certiorari had been granted, thus sandbagging the very court that was to decide the case. They do not require respondents to invoke all possible defenses to a claim when opposing a request for remand. Indeed, had the State acquiesced to Corcoran's petition, it would not have waived its merits defenses on remand. Particularly given that the precise contours of any given claim often are not fully apparent until the party asserting it attempts a plenary showing on the merits, it would be unfair to saddle remand opponents with the obligation to offer its full slate of merits defenses on pain of waiver.

3. Petitioner did not waive any arguments by not filing a statement following remand pursuant to Seventh Circuit Rule 54. Rule 54 statements are not merits briefs; they are statements concerning the procedural posture of a case following remand from this Court and are intended to inform the court of appeals about what action, as a matter of procedure, the parties wish the court to take. They are designed, for example, to afford the parties the opportunity to say whether further briefing or argument is necessary, whether remand to the district court is appropriate, or whether the issue on remand is ripe for decision.

Perhaps the limited purpose of Rule 54 statements are best illustrated by Corcoran's own in this case, which was properly limited to whether the court of appeals should remand the case to the

district court to consider Corcoran's claims in the first instance. Circuit Rule 54 Statement of Position, *Corcoran v. Levenhagen*, 593 F3d 547 (CA7 2010) (No. 07-2093) (Docket Entry 51). Not even Corcoran briefed the merits of his claims, let alone addressed the jurisdictional issue that only first crystallized with the court of appeals' later decision. Corcoran cannot fault Petitioner for sharing his own inability to predict the court of appeals' radical action.

4. Finally, the court of appeals did not find that Petitioner waived its argument. It could not, because it created the jurisdictional issue for the first time in its decision, and rehearing was the first opportunity that Petitioner had to address it. Indeed, if it believed the arguments were waived then it would not have substantially amended its opinion in an attempt to address its errors raised in Petitioner's petition for rehearing. Pet. App. 143a-146a.

II. The court of appeals lacked jurisdiction to correct a perceived state law error whether reviewed under AEDPA or not

Corcoran makes one correct observation: the court of appeals held that the Indiana Supreme Court made an unreasonable factual finding, resulting in an error of Indiana law that required remedy through habeas corpus. The problem with that analysis, as explained by *Goode*, is three-fold: (1) it is not the province of a habeas court to disagree with a state court about what that state's law allows, (2) habeas courts may not second-guess a state court factual finding that is at least debatable, and (3)

even if a factual finding was wrong, it has to result in a violation of federal law before habeas relief is permissible. 464 U.S. at 83-87.

Corcoran offers no response to the former two truths. As for the latter, Corcoran musters no authority finding a constitutional prohibition on non-statutory aggravating circumstances. The most he offers is the bald assertion that the question is no longer clear cut. Corcoran is incorrect about that—even the court of appeals understands that federal law permits state courts to find non-statutory aggravating circumstances. Pet. App. 7a (citing *Zant v. Stephens*, 462 U.S. 862, 878 (1983)).

Inexplicably, that court's analysis did not stop there. The Constitution does not both permit and prohibit the use of such circumstances at the same time. Where both the court of appeals and Corcoran go wrong is in assuming that § 2254(d)(2) permits habeas relief for any unreasonable factual finding irrespective of its relevance to constitutional error. Section 2254(a) limits the jurisdiction of a habeas court to errors of federal law. 28 U.S.C. § 2254(a); *Williams v. Taylor*, 529 U.S. 362, 375 (2000). A habeas petitioner should not be permitted to use § 2254(d)(2) as a back door to obtain a federal court declaration of what is and is not permitted by state law. Yet this is precisely what the court of appeals did here by disagreeing with the Indiana Supreme Court about what Indiana law says about a state trial court considering facts outside the statutory aggravating circumstances.

Goode is indistinguishable from Corcoran's case in any meaningful way. Corcoran's claim boils down to an invitation for the habeas courts to exceed their jurisdiction and grant him habeas relief based on a disagreement with the Indiana Supreme Court over an application of Indiana law. Just as this Court did in *Goode*, the court of appeals was required to deny relief. It refused.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

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Dated: September 15, 2010